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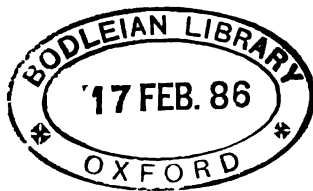
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H. D.

IN writing the following pages, I have made frequent use of Mr. Justice Cave's edition of Addison on the Law of Torts, Mr. Melville M. Bigelow's Leading Cases on the Law of Torts, together with Mr. Ball's English edition of Mr. Bigelow's valuable work.

F. T. P.

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LAW OF TORTS.

CHAPTER I.

Of Legal Rights and Duties.

LAW provides redress for violation of rights, inflicts punishment for breaches of duties. Each substantive in this sentence carries with it, when properly interpreted, a reflexion from the governing word Law. Thus, "redress" means legal redress, or civil remedy; "violation," illegal violation; "right," legal right; "punishment," legal punishment or civil penalty; "breach," illegal breach; "duty," legal duty. When, therefore, any of these words are used by themselves, it is essential to bear in mind that the adjective "legal" or "illegal," as the case may be, is implied. In endeavouring to ascertain what the law is which is applicable to any given set of circumstances, we are endeavouring to ascertain whether the act in question is an illegal violation of a legal right, or an illegal breach of a legal duty, and what legal remedy is given or legal punishment is imposed in respect of it. Thus it is that the maxims of our law do not in reality carry us very far into the study of the law itself. These three are familiar to every student: *ex damno sine injuriâ non oritur actio: sic utere tuo ut alienum non lædas: ubi jus ibi remedium.* They are very accurate statements of the law when the terms used in them are properly explained: very inaccurate unless they are so explained. To understand their meaning we must fully under-

Province of
Law.

Legal maxims.

stand the meaning of *damnum*; the nature of *injuria*; the extent of right or property involved in *tuo* and *alienum*; the proper interpretation of *lædas*, and the extent of *jus*.

It will be interesting at once to illustrate our meaning by two examples.

Cases illustrative of maxim *sic utere tuo*.

A. and B. are neighbouring landowners. B. digs a well in his own land, in consequence of which part of A.'s land in course of time falls in.

C. and D. are neighbouring landowners on the seashore. D. builds a sea-wall to protect his land from the encroachments of the sea, in consequence of which the sea is driven with more violence on to C.'s foreshore, and after a time swamps his property and damages his crops.

At first sight it would seem that the maxim *sic utere tuo* would apply to both cases, for both B. and D. have so used their own lands as to cause damage to others. But B. is liable, and D. is not. And yet to dig a well is no more unlawful than to build a wall on one's own property. But C. had no right to require D. not to build a wall, whereas A. had a right to require B. not to withdraw the support which his land afforded him. Consequently, under the circumstances, B.'s act was unlawful, because he had not replaced that support which his digging had removed. (See *Smith v. Thackerah*, and similar cases, with regard to the case of A. and B.; and *R. v. Pagham Commissioners* with regard to the case of C. and D.)

L. R. 1 C. P.
564.
[*post*, p. 139.]
8 B. & C. 353.
[*post*, p. 119.]

It is clear, therefore, that before we can lay down any accurate propositions of law we have to make many complicated preliminary inquiries. It would be a possible, but an endless, task to make a catalogue of legal rights, and a schedule of legal duties; to enumerate every act of commission and omission which has been held an illegal violation of the legal rights of others, or an illegal breach of legal duties laid on ourselves: and to conclude with a digest of legal remedies and penalties which would be consequential.

The subject, however, seems naturally capable of being

studied under three distinct aspects, each of which covers more or less the whole ground, but which are collectively essential to a complete understanding of the Law of Torts. These aspects are first, liability judged of by a series of broad general principles: secondly, liability judged of from the plaintiff's point of view, or, liability for acts or omissions: thirdly, liability judged of from the defendant's point of view, or, liability for consequences.

Under the first come the enquiries as to the origin of legal rights and duties: the place of commission of a tort: the effect of death, bankruptcy, and marriage of the tortfeasor or the party injured; and the effect of limitation and waiver: as to tortfeasors generally, including the liability for injuries by servants, animals, and inanimate things: as to damage generally: and as to breaches of statutory duties. [Chapters I. to VI.]

Under the second come *Mens Rea*, including Negligence: Fraud: and Malice. [Chapters VII. to IX.]

Under the third comes the examination of the particularly named torts: these are grouped under the three broad heads of injuries to the person: injuries to the reputation: and injuries to property. [Chapters X. to XII.]

It is impossible to draw a distinction between breaches of duties which concern the civil law and those which concern the criminal law; for many breaches of duty redress is exigible both at civil and criminal law, that is, they are both crimes and civil wrongs: and both or either method of redress may be set in motion by the party aggrieved. The civil wrong and its consequences can, however, be pardoned and remitted by the party injured; but the crime and its consequences can only be pardoned and remitted by the Sovereign. The criminal aspect of any breach of duty must, therefore, be at once put on one side. Acts may be criminal as well as tortious.

With regard to torts which are also crimes, a curious point arises. "For 300 years it has been said in various ways by Where the act is both criminal and tortious.

tions, civil action can only be maintained after prosecution.

10 Ch. D. 667.

L. R. 7 Q. B. 554.

But the law is at present unsettled as to how this rule can be enforced.

10 Q. B. D. 412.

Consideration of the rule,

judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising from a felony (Bramwell, L.J., *ex parte Ball, re Shepherd*). "No doubt it has long been established as the law of England, that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action is suspended until the party inflicting the injury has been prosecuted" (Cockburn, C.J., *Wells v. Abraham*). But it has always been a puzzle to judges how to enforce this rule of law. Four ways were considered by Lord Justice Bramwell in the above case, and each one was rejected as an impossible solution of this legal conundrum: they were, (1.) That no cause of action arises at all out of a felony; which is manifestly wrong: (2.) That it does not arise till prosecution; "that would make the cause of action the act of the felon, plus a prosecution," which is also manifestly wrong: (3.) That it arises on the act, but is suspended till prosecution; but insurmountable difficulties attend the carrying out of such a rule: chiefly because the suspension would then amount to a defence, and it would have to be set up by plea, contrary to the maxim *nemo allegans suam turpitudinem est audiendus*. Neither can it be carried into effect by nonsuit at the trial; the judge cannot refuse to try the cause (*Wells v. Abraham*): (4.) That there is neither defence to, nor suspension of, the claim by, or at the instance of, the felon debtor; but that the Court, of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied; "nobody ever heard of such a thing:" and how is the Court to find it out? how is the Crown to know of it?

It cannot be raised by demurrer (*Rooke v. D'Avigdor*).

The principle of the rule of law is that it is the duty of the person injured to prosecute for the criminal offence, because the law throws prosecutions on private individuals: but it is an extraordinary thing that no means of putting the rule in

force have as yet been devised ; although Lord Justice Bramwell hesitated "to say that there was no practical law as alleged by the respondent." Two ways hitherto unnoticed suggest themselves. The Court might possibly stay execution until prosecution : or the question might possibly be raised as a point of law under the new rules. and practical suggestions.

With regard to raising the question by plea it does not seem quite accurate to say that the defendant is relying on his own turpitude, for that surely is assuming the question which the jury has to try, either at Nisi Prius or at the Old Bailey. His plea would seem rather to take this form : I deny the plaintiff's allegations : but those allegations amount to an accusation of a criminal offence : since he has made those allegations he must submit them first to be tried by a Court of criminal jurisdiction ; I am in fact entitled to a verdict of acquittal of the criminal charge. How could the maxim *nemo allegans suam turpitudinem est audiendus* be applied to such a plea ? Query, is (3) entirely wrong ?

We propose now to inquire into the origin and nature of legal rights and legal duties. Outline of legal rights and duties.

I. There are rights vested in certain determinate persons which are *in rem*, that is, which are available against the community at large. Corresponding to them are duties laid on all other members of the community. These duties are always negative ; they are forbearances, because the duty is to abstain from hindering the exercise or enjoyment of the rights. Rights *in rem*.

These rights may exist at common law or may be created by statute. The violation of these rights, or the breach of these duties, is a tort.

II. There are rights vested in certain determinate persons which are *in personam*, that is, which are available only Rights *in personam*.

against a determinate person or determinate persons. Corresponding to them are duties laid on the determinate person or persons against whom the right avails as distinguished from the rest of the community. These duties are positive or negative according to the nature of the right, and are strictly termed obligations.

(a.) These rights and obligations are sometimes acquired and undertaken by mutual consent of the respective parties: a contract is thus brought into existence. The violation of these rights or breaches of these obligations are breaches of contract, and fall within the province of the law of contract.

(β.) These rights and obligations are sometimes acquired and imposed by implication of law; an implied (or *quasi*) contract is thus brought into existence. The violation of these rights or breaches of these obligations also fall within the province of the law of contract; although in many cases the circumstances under which the law implies the contract, constitute in themselves a tort.

(γ.) These rights are sometimes expressly given to determinate persons, and the corresponding duties are expressly laid on determinate persons independently of consent, express or implied. This occurs more generally in local and personal Acts of Parliament. The violation of the rights and breaches of the duties are usually classed under the head of torts. The relation between the parties is sometimes considered as a statutory contract.

(δ.) These rights are sometimes acquired as the immediate consequence of duties imposed on determinate persons towards certain other determinate persons by whom they are acquired. The breach of the duty involves the violation of the right, and is a tort.

The duties are imposed by statute, or are the consequence

at common law of a relation existing between the parties, and are sometimes said to be relative; they are also called private duties.

III. There are duties imposed on certain determinate persons towards the rest of the community.

Duties which may be termed *in rem*.

They are imposed by statute, or are the consequence at common law of a relation existing between the person on whom they are imposed and the rest of the community, and the breach of them falls within the province of the law of torts.

These duties are sometimes said to be absolute, and are also called "public duties."

This is an exhaustive outline of civil liabilities: it must be examined more in detail hereafter: for the present it will serve the purpose of giving us a purview of the law both of contract and of tort: with the latter only we propose to deal. Keeping it in view, the common definition that "a tort is a wrong independent of contract," has some definite meaning. Other and more elaborate definitions of a tort have been given, but they all endeavour, more or less successfully, to put concisely the result of what we have stated in more detail: we do not think it would serve any useful purpose to attempt to obtain greater conciseness.

Definitions of tort.

But the necessity for drawing a hard and fast line between breaches of contracts and torts, besides being convenient for the purposes of study, is practical even in the present day. Forms of actions have disappeared, but the question of costs in the Superior Court is still dependent upon the distinction being accurately understood.

Practical reason for distinguishing between tort and breach of contract.

It is curious, however, to see how in the times when the distinction was most important on account of the form of the action, it was most frequently lost sight of. Breaches of contract were perpetually being called torts: the breach of a

7 Ex: 372.

contract being considered a wrong in respect of which the party injured might sue either in tort or in contract [Broom, Common Law, 5th ed., p. 660]. On the other hand, we find such statements as the following: "An action of tort however would not lie for a *mere* breach of contract": *Woods v. Finnis*. It is probable that the meaning intended to be conveyed was, that where the consequences of the breach of contract extended beyond damage to property, the action might have been either in tort or in contract. For example, the dishonour of a customer's cheque by a banker who had the funds necessary to meet it, was nearly always laid in tort, the consequence of the dishonour being loss of reputation and credit: in the judgments, however, the fact that the banker's contract formed the basis of the action was never lost sight of (see *Marzetti v. Williams*).

1 B. & Ad: 415.

Rule as to costs in Superior Court.

3 Q. B. D. 23.

Case where there was in fact no contract.

The practical question in the present day is whether the action was rightly brought in the Superior Court, in which the plaintiff must recover over £20 in contract, and over £10 in tort, to entitle him to his costs. It will be sufficient here to notice two recent cases. In the first—*Pontifex v. Midland Ry. Co.*—the vendor of goods delivered them to the railway company as carriers, consigning them to the purchaser: before delivery they were stopped *in transitu*, and the company were required to redeliver them to the vendor. The company refused, and were thereupon sued for their value. The Court held that the original contract had been put a stop to by the stoppage *in transitu*: that as the company had refused to hold the goods for the consignor, no new contract had come into existence: and that the action, therefore, was founded on tort. Cockburn, C.J., laid down the following very simple principle: "If there is an express contract, and the act complained of is a breach of it, the action is clearly founded on contract: if there is no contract at all, but the act is an unauthorized intermeddling with property, it is clearly founded on tort."

3 C. P. D. 389.

A similar question arose in *Bryant v. Herbert*, which was

an action claiming the return of a picture or its value, and damages for its detention. The picture had been sent to the defendant voluntarily, and he had not agreed to give it up: no question of bailment therefore arose. But it was an action of detinue, which, "so far as the remedy is concerned in its legal signification, was founded on contract," and the rule as to costs in the Common Law Procedure Act dealt only with actions "founded on contract" or "founded on tort." The Court, however, came to the conclusion that the statute meant to deal, not with the form of action, but with the facts with reference to which the form of action is to be applied. Bramwell, L.J., said: "The substance of the matter was to be looked at; one may observe there is no middle term; the statute supposes all actions are either founded on contract or on tort. So that it is tort, if not contract, contract if not tort:" and Brett, L.J., said that he had come to a very clear conclusion that where persons are sued in detinue for holding "goods to which another person is entitled, the real cause of action in fact is a wrongful act, and not a breach of contract, because it may arise and occur when there is no contract, and the remedy sought is not a remedy which arises upon a breach of contract. The real substantial cause of action is a wrongful act."

Case where substantial cause of action was a wrongful act.

Where the action is for the breach of an implied term of the original contract, as in the case of accidents on railways, the same difficulty has arisen. In the contract to carry, is said to be incorporated a term to carry safely: and consequently the action has been treated as one founded on contract. Blackburn, J., in *Austin v. Great Western Ry. Co.*, [cf. p. 233.] expressly declared that it was founded on tort, and this seems now to be the accepted view.

Cases of railway accidents.

It will not be necessary again to refer to this fundamental distinction between tort and contract: putting aside, therefore, all questions as to the rights and duties arising out of contract, we may proceed at once to examine in more detail the remainder of the outline of rights and duties.

Outline of
rights and
duties more
fully ex-
amined.

Rights and duties are correlative terms and are co-existent. Sometimes the right is given, and sometimes the duty is created. In the former case, on the giving of the right the corresponding duty or duties, according as the right is *in personam* or *in rem*, come into immediate existence: in the latter case, on the creation of the duty the corresponding right or rights, according as the duty is to one or to many, come into immediate existence. In discussing torts, the terms violation of right and breach of duty are therefore equivalent terms: it is more usual to use the one or the other according to whether the right has been first created or the duty first imposed.

Rights *in rem*.
[Class I. of
outline.]

Rights on which "a man's being and well-being, his happiness and his security; in a word, his pleasures and his immunity from pains, are all dependent more or less," are rights which all possess alike, and which all alike are bound to regard. They are therefore said to avail against the world at large, or, more accurately, against all other members of the same political community: they are called rights *in rem*. They exist at common law, and are commonly divided into three classes: right to personal security: rights to reputation: rights to property.

It is necessary to understand fully the position which these great fundamental rights hold in the law of torts. The duty correlative which is laid on all, is to forbear from interfering with these rights: an interference with personal security, reputation or property, is consequently a breach of this duty and a violation of the corresponding rights; when they are violated the possessor of them is said to be *damned*, in respect of which he may recover damages. The violation of any of these rights is *damnum*.

Damnum

But as we have seen in the illustrations given at the commencement of this chapter, *damnum* may result both from wrongful and rightful acts: and the first principle of the law

of torts is that a man is not liable for the injuries he inflicts on other people, except so far as they are the consequences of his wrongful acts. If the act is rightful, the maxim of law is, *ex damno absque injuriâ non oritur actio*, and the party damaged has no redress. Thus it is essential that there be a wrongful act, and this act is *injuria*.

cum injuriâ,
essential for a
tort.

These two, *damnum* and *injuria*, are the elements of a tort : and as it is true to say that no action arises from *damnum* without *injuria*, so also it is true to say that no action arises from *injuria* without *damnum*. In some cases, as we shall see hereafter (see the chapter on Damages), the law presumes the *damnum* when the nature of the case is such as to justify the presumption.

The fundamental rights to person, reputation, and property, are therefore more properly said to be rights not to be damaged in person, reputation or property, by the wrongful acts of other people.

The three
fundamental
rights ex-
plained.

Now it follows as a general rule, that in violations of these rights, or breach of the corresponding duties, we have both *damnum* and *injuria* : if the act is not a wrongful one, it lies on the person who has caused the damage to shew it ; and he may do this by shewing that the act was one which it was not unlawful for him to commit.

Again, since every one possesses these fundamental rights, the rights of different people may clash ; thus, one man's right to do what he likes upon his own property may conflict with another man's right to the security of his property. Therefore, although it is true to say that there is a duty laid on all to forbear from injuring my property, that duty does not restrain them from doing what is lawful on their own property (or, putting it into a larger proposition, acting in accordance with their own rights), even though damage to my property may be the result. It is evident that the resultant of this conflict of rights must vary with every person, and that the variation must depend on the nature of the right exercised by each person. The full enjoy-

Conflict of
rights residing
in different
people.

the resultant
is a right *in*
personam.

[Class II. (8)
of outline.]

ment of my right to property, for example, so far as another given person is concerned, must be limited so as to allow of the exercise by that person of his own rights; and, on the other hand, that person's enjoyment of his own rights must depend in a certain measure on the rights which I myself possess. This conflict of rights arises in many well-known instances out of certain relations existing between their respective owners; and the law has endeavoured, and continues to endeavour as occasions arise, to frame certain rules to regulate the conduct of people who are placed in these relations; that is to say, law defines the duty of the one with regard to the fundamental rights of the other; in some cases it preserves the fundamental right intact, in other cases it cuts it away to allow for the due exercise of the rights of the other person.

[cf: p. 2.]
Example of
curtailment
of right.

Thus, in the case of neighbouring landowners, the digging of a well in D.'s land is a proper exercise of his rights of property: but seeing that the exercise of that right is likely to lead to the damage of C.'s land, by reason of the special relation which exists between C. and D., the general right of property has given way to the special right of lateral support; consequently, if D. wishes to dig a well in his own land he must replace the support which he removes by so doing.

[cf: p. 316]
Example of
destruction of
right.

Again, take the case of violation of the right to reputation; in consequence of the privilege which the law has said shall arise on certain occasions, on which special relations are assumed by the speaker, both as regards the person spoken of and the person spoken to, the right to reputation entirely disappears, unless the privilege is rebutted by malice.

Other examples of the rights and duties arising out of special relations are to be found in the cases of host and guest, shopkeeper and customer, master and servant, and in many other occurrences of daily life.

Explanation
why these
rights are *in*
personam.

We have said that these rights are *in personam*, and this is strictly true, although the area of the duty is at times greater than it is at others. In a certain measure the duty is towards

all the community, because any member of the community may bring himself within the supposed relation. For example, the duty to provide medicine for seamen on board a certain ship may be said to be towards all the community, because any member of it may become a sailor on board the ship. So, taking one still wider, the duty to provide communication cords in trains for the benefit of passengers may be said to be towards all the community, because any member of it may become a passenger in the train. And some confusion has arisen in many cases in determining whether a duty is strictly speaking private or public; a distinction involving, as we shall see, important consequences. The more correct view certainly seems to be that when a duty is limited in its area, and only arises towards certain people who fulfil certain conditions, that is, who bring themselves within the relation to which the duty applies, such a duty is a private duty. When the area of the duty, however, is indefinitely extended, this division [II. (*d.*)] merges into the third and last division, public duties strictly so called.

We have, therefore, two distinct sets of rights. The first, the three great fundamental rights, which are *in rem*; and which are rights not to be damaged in person, reputation, or property by any wrongful act, the duty being to forbear from violating them. The *injuria* is here found in the violating act causing the damage. The second, the *special modifications of the three fundamental rights, which spring out of certain relations in respect of which the law fixes certain duties*; the modifications being made in respect of certain given individuals on whom the duties, modified to correspond, are laid; being in respect of certain given individuals, they are *in personam*. These two sets are indicated in divisions I. and II. of the preliminary classification.

These are the only two divisions of the subject which create any difficulty. With regard to the others it is only necessary to dwell for a moment on [II. (*β*)]: the duties

Remainder of
outline con-
sidered.
[Class II. (*β*)
of outline.]

which arise in respect of these rights being strictly called obligations, and are implied by law in consequence of a relation between two or more parties voluntarily assumed by at least one of them. These are termed implied or *quasi-contracts*.

Examples of
quasi-con-
tracts.

Numerous examples will be found in the books dealing with the law of contract ; it will be sufficient here only to give a few familiar examples. If I employ a person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labour deserves ; or, if I take up wares from a tradesman's stall without any agreement as to price, the law concludes that I contracted to pay their real value. So, as to the implied contract to feed a horse I have borrowed ; or to conform to the custom of the trade or business in respect of which the original contract is made ; or to pay rent where a tenant holds over ; or, in the action for money had and received by the defendant to the use of the plaintiff. These implied contracts have an important bearing on the law of torts, which we shall consider under the subject of waiver of torts.

[Class III. of
outline.]

The last class are duties imposed on determinate persons towards the whole of the rest of the community ; such duties as may aptly be termed duties *in rem*.

This class is, therefore, only a larger and more extended form of the preceding one, and includes all public duties strictly so called.

These are, as in the previous case, often imposed by statute, the persons being known as public officers ; they are also imposed by the common law, breaches of the duties being usually denominated public nuisances.

Of the important distinction between breaches of private and of public duties, and the necessity of proving in the latter special damage, we shall speak in the chapter on Damages—under the head of Peculiar Injury to the Individual.

CHAPTER II.

Of the Place of Commission.

HAVING examined the nature of a tort, the next question to be considered is, over what torts or tortfeasors will the English Courts exercise jurisdiction? This is, in reality, a point of practice, and in one respect, namely, where the tortfeasor is an alien, has undergone some changes as new Rules of Court have been promulgated. The subject divides itself into three heads; first, as to the act itself, the subject-matter of the action; secondly, as to the actor or tortfeasor, the defendant in the action; thirdly, as to the person injured, the plaintiff in the action.

English jurisdiction over torts committed, and tortfeasors resident, abroad (1)

First, then, as to the act itself: will the English Courts entertain actions in respect of torts committed in other countries? Under certain conditions, yes: and the following rules are applicable to all tortious acts committed out of the jurisdiction of the English Courts, whether in a foreign country, in a British colony, in Scotland or in Ireland. The law in Ireland and in many of the colonies being identical with English law, no question arises in respect of acts committed in them, the difficulty owing its origin solely to the different laws in force in different countries.

Torts committed abroad

Now the application of laws being strictly limited to acts done within the territorial jurisdiction of the country in which they are in force, it follows that the first rule is that the act complained of must be a tort in the country in which

Act must be a tort by law of country where committed.

(1) The various points of law and practice which arise in this chapter are fully considered in the author's *Treatise on 'Foreign Judgments, and the practice as to Parties out of the Jurisdiction.'*

it was committed. "The act must not have been justifiable by the law of the place where it was done:" *Phillips v. Eyre*.
 L. R. 6 Q. B. 1. It is clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in the English Courts. For example, in
 1 P. D. 107. *the M. Mocham*, a British ship entering a Spanish port damaged the pier owing to negligent navigation: by the law of Spain the liability for the tort rested on the master and mariners, and not on the ship or her owners as in England. The English action against the ship was dismissed, because by the law of Spain the owner was not considered a tort-feasor.

Phillips v. Eyre, the celebrated case against the Governor of Jamaica, furnishes the best illustration of the rule, because since the grievances complained of the legislature of Jamaica had passed an Act of Indemnity, taking away any rights of action which might otherwise have existed: it was held, that an action in respect of these grievances could not be brought in this country.

Must also be a
tort by
English law.

The second rule is, that the act complained of must *also* be a tort according to English law.

Thus in a cause of collision in England, for damage done in Belgian waters owing to the improper navigation of a steamer, the owners pleaded that the vessel was in charge of a pilot whom they were compelled by Belgian law to employ. To this it was answered that by Belgian law the owners would still be liable, although the collision was occasioned by the negligence of the pilot. The owners replied that they would not be liable under the circumstances by English law.

L. R. 2 P. C.
193.
General rule.

And this reply the Privy Council held good: *The Halley*.

The law, therefore, is, that where the act complained of has been committed abroad, it must, in order that an action may be sustained in this country in respect of it, be a tort, both by the law of the foreign country and by English law.

1 H. & C. 219. To this must be added the rule laid down in *Scott v. Sey-*

mour. Where both laws concur in allowing civil proceedings for damages to be taken in respect of the act, it is no defence to an action in this country to say that in the foreign country criminal proceedings must be taken first, this being simply a rule of procedure, which has nothing to do with the simple question, is the act a tort in both countries or not ?

No defence that criminal proceedings have not been taken abroad according to foreign law. [cf: p. 3.]

With regard to acts done on the high seas, that is to say, on board ships outside the limit of jurisdiction at the time of the commission of the act, it would seem that the law applicable under the first part of the above rule would be the law of the country to which the ship belonged. It is certain that by English law, English ships are supposed to carry the English law with them until they come within the jurisdiction of another country ; and the same rule presumably applies to foreign ships.

Torts committed on the high seas.

Secondly, as to the tortfeasor, or defendant in the action.

If he is in this country, whether a subject or an alien, an action may be brought against him for a tort committed in the country, and also, subject to the first rule, for one committed abroad. [See *Mostyn v. Fabrigas* on this subject.] But if he is not in this country, then no action can be brought against him, whether subject or alien, unless he is domiciled or ordinarily resident within the jurisdiction (1).

Rule where the tortfeasor is abroad, and tort committed, (Cowp : 161) either in England or abroad.

Thirdly, as to the person injured, or plaintiff in the action.

His right to sue does not depend in any way upon his nationality. The only disadvantage under which a plaintiff resident abroad labours, is that he must (if application is made by the defendant within a proper time) find security for costs, whether he be subject or alien, unless he possesses unencumbered real property within the jurisdiction upon which execution can issue for costs of an unsuccessful suit.

Practice where plaintiff is abroad, and tort committed either in England or abroad.

(1) By the Judicature Act, Order XL, rule 1 (c), Service of a writ of summons out of the jurisdiction may be allowed by the Court whenever any relief is sought against any person domiciled or usually resident within the jurisdiction.

The rules as to this security are slightly more stringent against an alien than against an English subject.

The tort itself to be distinguished from the evidence of the tort.

On the question of torts committed out of the jurisdiction, it is important not to confuse the law determining whether an act is or is not tortious with the law which governs people's conduct under certain circumstances, the violation of which would not of itself be a tort, but would be evidence to shew that the tort in question had been committed. For example, in England the rule of the road is to pass by the left; in France it is to pass by the right. Where a collision had occurred between two vehicles in Paris, failure to observe the French rule of the road would be received as evidence of negligence, if the action for damages were brought in England. The fact that the driver had passed by the left would not bring the case within the second part of the first of the above rules so as to constitute a good defence. The act complained of would not be the passing by the left, but the negligence in running down. The English Court would admit proof of the foreign law as one of the facts upon which the existence of the tort, or the right to damages may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established.

Selwyn, L. J., in
The Halley, L. R.
2 P. C. at p. 203.

CHAPTER III.

Of Death and the Discharge of Torts generally.

§ 1. ACTIO PERSONALIS MORITUR CUM PERSONA.

THIS maxim of the Roman law has been made use of at all stages of our legal history to convey a general notion of the effect of death on the consequences of a tort. The terms used require, however, some little explanation. Firstly, *actio personalis* is not synonymous with personal action, for under this head would be included actions on contracts: in using the maxim, however, the judges were always careful to explain that it was only to be understood of a tort, and so of an action essentially personal in its nature. Secondly, the word *persona* suggests the inquiry which person, the injured party or the party injuring? The answer being either.

Terms of the maxim explained.

It was a principle of the common law that if an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done. But this rule was greatly altered at an early stage of our legal history by the statute 4 Edw. III. c. 7.

Principles of early common law.

Williams on Executors.
Gradually modified by statute.

Item, Whereas in times past executors have not had actions for a trespass done to their testators as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished: It is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were in life.

And by 25 Edw. III., st. 5, c. 5, it was enacted that

"executors of executors shall have the benefit and charge of the first testator."

The statutes explained.

7 East 128.

Williams on Executors.

Injuries to realty.

Lord Campbell's Act.

These statutes being remedial in their nature have been construed very liberally, as was explained by Lord Ellenborough in *Wilson v. Kimbley*. "It was," he said, "a very ancient statute passed at a period when no great precision of language prevailed; and the body of the Act does not speak of *actions of trespass*, though the instance put is proper for such an action; but it speaks of actions *for a trespass* done to the testator's goods; and it enacts that executors in such cases shall have *an action against the trespassers*, apparently using the word *trespass* as meaning a wrong done generally, and the *trespassers* as *wrongdoers*: it does not specify the nature of the action. The words, therefore, were capable of letting in a construction which met the mischief intended to be redressed." The effect of the series of old cases interpreting this statute may be put shortly as follows: "An executor or administrator shall now have the same actions for any injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator, as the deceased might have had whatever the form of action may be." To enable the executor to sue, the injury must have been such as would damage or diminish the testator's estate, for the Act expressly refers to the "goods and chattels" of the testator, and therefore injuries done to the person or to the freehold of the testator do not come within the mischief of the statute.

The Act 3 & 4 Will. IV. c. 42, enables executors to sue for injuries to the real estate of the deceased, and be sued for injuries to property, real or personal, by their testator, committed six months before his death.

Finally, by Lord Campbell's Act (9 & 10 Vict. c. 93) the executor or administrator of a person killed by "wrongful act, neglect, or default such as would (if death had not ensued) have entitled the party injured to maintain an action

and recover damages in respect thereof," is enabled to bring the action for the benefit of the wife, husband, parent, or child of the deceased.

Thus qualified, the maxim *actio personalis moritur cum personâ* is still the law of England.

(i.) *Where the deceased is the party injured.*

There appears therefore to be an essential difference between actions on contract and on tort, and it has been explained in different ways. In Williams on Executors it is said that "the reason appears to be that these (debts due and contracts broken) are choses in action, and are parcel of the personal estate in respect of which the executor or administrator represents the person of the deceased, and is in law his assignee." In *Wills v. Murray* it was said that it was due to the presumption of law that the parties to a contract bind not only themselves, but their personal representatives. Contracts involving the exercise of personal skill or taste nevertheless, owing to their peculiar nature, would not be included in this presumption; they do not survive to and are not enforceable against the representatives.

The alleged distinction between tort and contract examined.

4 Ex: 843.

Contracts for personal skill.

In truth, however, no distinction of principle exists. We shall find on examining the cases that the only difference between torts and contracts is that there is a presumption of damage to the estate in the latter case which does not exist in the former; and that in both cases this presumption may be rebutted—in torts to prevent the maxim applying, in breaches of contract to introduce its application.

In *Knights v. Quarles* the intestate had retained the defendant as his attorney to investigate and procure a good title of an estate about to be conveyed to him as purchaser; the attorney had accepted a bad and defective title, whereby the intestate could not dispose of the estate, and had been put to expense in endeavouring to obtain a good title, whereby also the property had remained uncultivated and lessened in

4 Mo: Ex: 532.

value. A discussion arose as to whether the action was in tort or in contract, but Dallas, C.J., said "it has been admitted, and most properly, that it is immaterial whether it be in form of tort or contract, as the substance only must be looked at." In one respect, wherever death has ensued from a tort, it may be said that the estate of the deceased comes to his representatives very much smaller than it would have done had he lived to augment it; the maxim however is intended expressly to meet this argument, unless indeed it is shewn that the estate has really suffered during the lifetime of the deceased, in consequence of the accident. An action is then maintainable outside Lord Campbell's Act. Thus, in *Bradshaw v. Lancashire and Yorkshire Ry. Co.* an action was brought by an executor for damages to the personal estate of the deceased, who died in consequence of injuries received while travelling on a railway; and the Court of Common Pleas held the action maintainable on the ground that the estate was damaged, not consequentially upon the testator's death, but by his inability to attend to his business in his lifetime, which was the direct and natural result of the injury he suffered. And his right was held not to be affected by Lord Campbell's Act, which provides for compensation to be made to certain relatives in respect of the death, but which could not be held to affect any right of action which the executor would have had if that Act had not passed. Where a death has occurred the executor has in reality two actions which it would seem may or may not be combined in one; the first on behalf of the family of the deceased consequential on the personal injury; the second on behalf of the estate consequential on the loss (if any) to the estate immediately and naturally arising out of the accident.

L. R. 10
C. P. 189.
The distinction between actions under Lord Campbell's Act, and those for loss to the estate examined.

Two kinds of damage may result from an accident.

Accidents may thus cause two sorts of damage: first, the damage to property, or the pecuniary loss to the estate of the person injured, immediately and naturally arising out of the accident; secondly, the damage to the person, in respect of which pecuniary damages are also recoverable. The person

injured is entitled to recover both damages in respect of his personal injuries, and also as special damages any loss arising from the diminution in the receipts of his business consequent on his inability to attend to it, and for money out of pocket paid to doctors, &c. When the injuries terminate in death, the former damages are taken away, the action under Lord Campbell's Act being substituted for the benefit of those dependent on the deceased (1); the latter remain, because to that extent his estate has been depreciated. *Bradshaw's case* was followed in *Leggott v. Great Northern Ry. Co.* (2), and it was held that both actions might be brought independently by the executor, and that the second action was not barred by the judgment and satisfaction under the first.

1 Q. B. D.
599.

So, too, in the case of contracts it is essential, in order for the action by the executor to be maintainable, that the estate should have been diminished. This question was much discussed in *Chamberlain v. Williamson*, an action by the administrator for a breach of promise of marriage made to the intestate by the defendant: "The general rule of law," said Lord Ellenborough, C.J., "*is actio personalis moritur cum personâ* ; under which rule are included actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the injury of their personal estate. Marriage cannot be considered as an increase of the individual transmissible personal estate." For the action to be maintainable it was consequently held essential to prove special damage: that is to say, that the estate had in fact been damaged.

Contract
cases
examined.

2 M. & S. 408.

This rule was said to apply with equal if not greater force to all actions founded on an implied promise to a testator,

(1) Lord Campbell's Act does not create another cause of action ; therefore if the deceased has already recovered in respect of his personal injuries, his wife and family have no action under the Act : *Read v. Great Eastern Ry. Co.*

L. R. 3 Q. B.

(2) But not without doubt. It is however submitted that *Bradshaw's case* is good law.

555.

"where the damage subsists in his previous personal suffering": because if it were not so, actions could be brought for "all injuries affecting the life or health of the deceased; all such as arise out of the unskilfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney, for all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention"; but the learned Chief Justice considered it clear that such actions could not be brought. Under this category, of course, come the two railway cases just considered.

Cases of pure
torts exam-
ined.

On the other hand, reverting to pure torts, it is not strictly accurate to say that actions in respect of them always die with the person injured; they also survive if his estate has suffered. The instances which are usually given of actions brought by an executor for damage done to the estate are, "replevin or detinue for taking of goods in the lifetime of his testator, because the property still continues, and so does the wrong to his estate. So he may have trover for any conversion in the life of the testator"; so also an action will lie at the suit of an executor against a sheriff for a false return in the lifetime of the testator: *Williams v. Cary*; and also for an escape: *Berwick v. Andrews*. "And the reason is that by their wrongs the value of the testator's personal estate was diminished" (Bramwell, L.J., *Twycross v. Grant*). The question then arises whether, as in the cases of implied contract, special damage to the estate must be shewn. Lord Justice Bramwell held that it was not necessary, and that it would be sufficient, if the injury, from its nature, must diminish the personal assets. In *Twycross v. Grant* the action was brought to recover from the promoter of a public company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them omitted to disclose certain contracts which, under sect. 38 of the Companies Act, 1867, ought to have been specified therein. The Court of Appeal held that it was an action for a wrong done, not to

4 Mod: 403.

12 Mod: 71.

2 Raym: 971.

4 C. P. D. 40.

the intestate himself, but to his property, and that therefore it could be maintained, or continued, by the executor.

The general rule therefore would seem to be as follows. The damage to the estate need not be specially pleaded as a general rule in breaches of contract, and in some cases of tort, where, from the nature of the injury, it is clear the damage must have occurred ; but as a general rule in torts, and in some cases of contract, more especially where there has been a breach of a promise implied in the terms of it, and where the injury is not apparent, special damage to the estate must be shewn in order to support the executor's action. In other words, the presumption in cases of contract is that the estate of the deceased has suffered, but in cases of tort the presumption is that it has not. But in either case the presumption may be rebutted, in some cases of contract the actual damage having to be proved, and in some cases of tort the actual damage not having to be proved.

General rule
both as to
contracts and
torts.

(ii.) *Where the deceased is the tortfeasor.*

The law was laid down by Lord Mansfield in *Hambly v. Trott*, an action of trover brought against an administrator with the will annexed, for a conversion by the testator in his lifetime. A verdict was found for the plaintiff, but the Court unanimously arrested the judgment, on the ground that the cause of action was a personal tort which died with the person : “ Where the cause of action is money due or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, or a promise of the testator express or implied : where these are the causes of action, the action survives against the executor. But where the cause of action is a tort or arises *ex delicto*, supposed to be by force and against the king's peace, there the action dies ; as battery, false imprisonment, trespass, words, nuisance, escape against the sheriff, and many other cases of the like kind. . . . In every case where any price or value is set upon the thing

1 Cowp: 371.

Causes of
action which
survive
against an
executor.

in which the offence is committed, if the defendant dies, his executor shall be chargeable: but where the action is for damages only, in satisfaction of the injury done, then his executor shall not be liable. . . . So far as the tort itself goes, an executor shall not be liable; and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable: but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged." This judgment was elaborately reviewed very recently by Bowen, L.J., in *Phillips v. Homfray*, in which case the plaintiff claimed to be compensated for the secret and tortious use made by the deceased, during his lifetime, of the underground ways and passages under the plaintiff's farm, for the purpose of conveying his coal and ironstone. The main principle of law was held to be that the remedy for a wrongful act, apart from contract express or implied, ceases on the death of the wrongdoer in every case except those in which property, or the proceeds or value of property, belonging to another have been appropriated by a deceased person and added to his own estate or moneys; the action being in substance to recover the property or its value. "Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby to himself. Two illustrations can be given of the above distinction with regard to the liability of executors. The produce, proceeds, or value of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors, and retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste—permissive or voluntary—as such, lies against the executors of a tenant for life. By non-repairing a house, or by ploughing

24 Ch.D. 439.

General rule
laid down
by C. A.

applied to a
case of in-
direct benefit
to the estate.

up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognises in this indirect benefit which he may have received, any ground for proceedings against his executors. A second illustration may be given of the distinction we have referred to. The rents, or the produce or profits of land which have wrongly been received by a person other than the rightful owner (as a rule, and subject to certain exceptions that we need not now discuss) may be pursued by the rightful owner, and recovered from the wrongdoer, or, if he is dead, from his estate. But there is a sense in which the term "profits" is used, with reference to land, to represent the unliquidated damages recoverable in respect of a trespass, as when an action for mesne profits is maintained, to recover, not the rents or produce of land, or their equivalent, but compensation for the bare possession, wrongfully taken and held, of the land itself. An action for mesne profits, in this narrower sense, will not lie at common law, and apart from statute, against executors, and no account would be decreed in equity, except in a case where the profits were either property, or the produce or profits, or value of property actually received." The whole law on the subject and the early cases were then passed in elaborate review, and the Court held that the rule they had laid down was to be applied strictly, and the mere fact that expense had been saved to the estate was not sufficient to bring the case within those actions which may be brought against the executor.

One further test was proposed: whenever it would have been possible for the plaintiff in the testator's lifetime to have waived the tort and brought an action on an implied contract or duty, such action survives against the executor. "In other words, could the plaintiff have sued the deceased at law in any form of action in which 'not guilty' would not be the proper plea?" This point will be considered later in this chapter. Test supplied by rule as to waiver. [post, p. 34.]

The case of *Kirk v. Todd*, decided by Sir G. Jessel, M.R., 21 Ch.D. 484.

was a similar case. The owners of certain dye works sued the original defendants for fouling and polluting a brook. The action was held not to survive, "because it did not appear that the defendant got any benefit by fouling the stream," although, as Bowen, L.J., explained in the subsequent case, "in every case where one man fouls the flow of water to which another is entitled, he probably saves himself expense by doing so."

The Court held further, that there was no equitable doctrine which could extend or vary these rules of the common law (1).

L. R. 6 H. L. 377. In *Peek v. Gurney* an action for deceit against a director of a company for misrepresentation in a prospectus was held not to survive against his executors.

[*ante*, p. 24.] The distinction between this case and *Twycross v. Grant* is obvious: in that case the estate of the deceased had been affected, but in this case it was not, because the benefit of the director's deceit was derived by the company. Where, however, a direct benefit to the estate has been derived by a fraud, it is presumed that the action would survive; the stress in the case of *Phillips v. Homfray*, being upon the indirect benefit derived by the testator from his act.

General rule on entire subject. Taking both cases of tortfeasor and injured party together, the rule to be deduced is shortly this: that the action for personal injuries survives to or against the executor if the estate has been prejudiced or has profited, as the case may be.

Same rule applies when death occurs during progress of action. It frequently happens that the question arises in the course of the action, or pending an appeal from a judgment on which execution has been stayed; the same rules apply, the essence

1 De G. J. & S. 678. (1) The case in which equity has gone furthest would seem to be *Walsham v. Stainton*, in which two confidential agents of a partnership had concurred in a breach of duty towards the firm; and although only one of them had derived any benefit from the fraud, the other was liable in equity for the benefit so derived; the Court held, therefore, that the liability attached to his personal representative as if his estate had been actually benefited.

of them being that they relate to claims for unliquidated damages which have not been perfected by final judgment : *2 Atk: 385.*
Smith v. Eyles.

§ 2. STATUTES OF LIMITATION.

It is convenient, but somewhat inaccurate, to say that a tort is discharged by effluxion of time. The more correct expression is that if an action is not brought for a tort within a certain time (varying according to the nature of the tort) after it has been committed, the defendant is at liberty to plead the Statute of Limitations. If he does so, the remedy is gone so far as the Courts of this country are concerned. These statutes being part of the *lex fori*, this rule is equally applicable to torts committed abroad or in this country. But on the other hand, they only affect the remedy in this country, and an action may still be brought in respect of the tort in the Courts of another country, subject to three conditions :

Effect of Limitation Act on cause of action.

1. That the defendant is amenable to the jurisdiction of the Courts of the foreign country according to the law it administers ;

2. That the case falls within the law of torts of that country ;

3. That the action is not barred by time by the statutes of limitation of that country. If an action is so brought, and the plaintiff obtains judgment in the foreign Court, he may bring an action in the English Courts on the foreign judgment, notwithstanding the right on the original cause of action has been barred by the English Statute of Limitations.

Sect. 3 of the " Act for Limitation of Actions, and for avoiding of suits in law " (21 Jac. I, c. 16), so far as it relates to torts, is as follows :—

Limitations of actions for tort.

That all actions of trespass *quare clausum fregit*, all actions of trespass, detainue, actions in trover, and replevin for taking away of goods and cattle, all actions upon the case, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, shall

be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say), the said actions upon the case (other than for slander), and the said actions for trespass, detinue, and replevin for goods or cattle, and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after ;

and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within four years next after the cause of such actions or suit, and not after ;

and the said action upon the case for words, within two years next after the words spoken, and not after.

and by sect. 7, if the plaintiff at the time the cause of action accrued is within the age of twenty-one years, or is a *feme covert*, or *non compos mentis*, the limiting time shall not begin to run against them until they become of full age, or discover, or of sane memory.

Special cases.

Where rights and duties are created by statute there is usually inserted a clause limiting the time within which action may be brought. Thus an action for infringement of copyright must be brought within twelve months from the date of the infringement. So no action may be brought against any justice of the peace for anything done by him in the execution of his office unless it be commenced within six calendar months after the commission of the act complained of.

The time begins to run from the happening of the damage;

The most important question which arises in connection with the Statutes of Limitation is the determination of the time from which the limiting period begins to run.

We have already seen that a tort is not complete until damage has resulted from the act. Obviously, therefore, the time of limitation cannot begin to run until this damage has occurred, and does begin to run immediately on its occurrence.

This point is not a little confused by the introduction of the familiar principle—that wherever a right has been violated a cause of action will lie for at least nominal damages: and therefore it has been assumed in several cases that the time of limitation must begin to run from the commission of the

act which violates the right. This principle we propose to discuss at length in the chapter on Damages. We may, however, for the purpose of this chapter, avail ourselves of the result of that discussion. It will be found that, dependent on the nature of the act, the law presumes that damage must flow from some acts as a necessary and inevitable consequence; and from other acts the law does not presume this as an inevitable consequence. Where there is a presumption of damage the rule already given still applies, the time running from the damage; in this case the act and the damage coincide in point of time, and the cause of action being complete on the happening of the act, the time appears to run from the act. The rule, however, is the same in both cases.

or, from the act if the law presumes damage.

The action for words affords a simple illustration of this. In five cases (of which four are slander proper, and one is libel) the law presumes damage to follow from the act of speaking or writing the words, and the cause of action arises immediately the words are uttered; in all other cases the law does not presume that damage must have followed from speaking the words, and therefore the cause of action does not arise until it is shewn that damage has in fact followed. But in both cases the cause of action is none the less the resulting damage, and consequently the time of limitation runs in both cases from precisely the same point, namely, the happening of the damage: *Saunders v. Edwards*. In the first five cases this point coincides with the time of the commission of the act; and a difficult question might possibly arise, whether the recovery of nominal damages for the violation of a right to which the law attached damage by presumption, would be a bar to the subsequent recovery of substantial damages actually suffered, even though the limiting period calculated from the commission of the act (the presumption of damage completing the cause of action) had expired. (This was suggested by Bowen, L.J., in *Mitchell v. Darley Main Colliery Co.*)

Example from slander
[*Post*, p. 304.]

1 Sid: 95.

14 Q. B. D.
at p. 137.

- ¹ 16 East. 215.
² 1 R. & M.
 161.
³ 10 Ex: 259.
⁴ 9 H. L. ca:
 503.
⁵ 10 C. B:
 N. S. 765.
⁶ 3 Q. B. D.
 389.
⁷ 14 Q. B. D.
 125.

This subject has been discussed in several very important cases arising out of the subsidence of land: *Roberts v. Read*,¹ *Gillon v. Boddington*,² *Nicklin v. Williams*³ (overruled), *Backhouse v. Bonomi*,⁴ *Whitehouse v. Fellowes*,⁵ and *Lamb v. Walker*.⁶ They were all elaborately reviewed by the Court of Appeal in the recent case of *Mitchell v. Darley Main Colliery Co.*,⁷ and it will be sufficient for our purpose to apply the judgments there delivered to the ordinary state of facts.

Example from
 case of subsi-
 dence of land.

The plaintiff is the owner of land under which there are mines belonging to the defendant. The minerals are excavated, and after the lapse of some time a subsidence occurs in the land above, doing damage not only to the land but, for example, to buildings erected on it. Under these circumstances the question arises what is the cause of action, the excavation or the subsidence? But the excavation was a rightful act: and "an act which is right at the time when it is done, cannot be turned into a wrongful act by something that happened subsequently. Therefore it was held by the House of Lords in *Backhouse v. Bonomi*, that the excavation was not the cause of action; it was only the cause of the cause of action; the cause of action was the subsidence and that alone; the defendant had so used his property as to make the plaintiffs' property subside, and it was the making their property subside which was the cause of action." The wrongful act is therefore the omission after excavation to take precautions against the consequences of that excavation.

9 H. L. ca:
 503.

Case of second
 subsidence.

But suppose that some years after the damage arising from the first subsidence has been compensated for, a second subsidence occurs. "The mineowner has excavated in his own property; he knows that he has caused a subsidence to his neighbour's property, and he knows that that neighbour is entitled to damages for it: will he run the risk of allowing that excavation to continue, the effects of which he may obviate by immediately putting a wall or propping up his own property? There is nothing to prevent him: will he allow it to continue or will he not? If he does nothing, he is

not counteracting the effects on his neighbour's property of something which he has done on his own; he is not counter-acting that mischief to his neighbour by doing something on his own property; and if there is a new subsidence, that will give his neighbour a new cause of action" (Brett, M.R.). Therefore each subsidence is a new cause of action, although the *causa causans* of each subsidence may be the same; in other words, each fresh subsidence is a fresh interference with the enjoyment of property, and is, as it arises, a wrong done, creating a new cause of action.

From this it follows that where the wrong done is of a continuing nature, as in false imprisonment, the cause of action continues *de die in diem*, and therefore an action may be brought at any time within the limiting period, as calculated from the cessation of the wrong, for so much of it as occurred within that period. If after action brought, the wrong is still continued, a fresh cause of action arises: subject of course to the duty (as explained by Brett, M.R.) to sue for injuries both existing and prospective, if the nature of the case allows it.

Continuing
cause of
action.

14 Q. B. D.
at p. 133.

It will be useful to notice one other case, *Wilkinson v. Verity*. Goods had been bailed by the plaintiff for safe custody to the defendant, who sold them. The plaintiff, more than six years after the sale, and in ignorance of it, demanded the return of the goods, which the defendant refused. In an action of detinue the defendant pleaded that the cause of action had not accrued within six years. The Court held that if the action had been for damages for the conversion, "in which the demand and refusal would have been only evidence of a conversion," the defence under the statute could have been maintained, and the ignorance of the plaintiff could not have prevented its operation. But the action of detinue in this case was resorted to "for the purpose of asserting against a person entrusted for safe custody a breach of his duty as bailee, by detention after demand, independent of any other act of conversion, such as would make him liable in an action

Example from
detinue.
L. R. 6 C. P.
206.

of trover," and that therefore the statute began to run from the date of the demand and refusal.

§ 3. ACCORD AND SATISFACTION.

So long as the damages remain unliquidated, the person injured may accept from the tortfeasor any sum agreed upon in full discharge of his claim against him.

2 De J. & S.
319.

Effect of receipt in full of all demands where damages unliquidated.

The receipt, however, is not an absolute estoppel. In *Stewart v. Great Western Ry. Co.*, while the plaintiff was lying suffering from an accident, persons went to him on behalf of the company, and induced him to accept a small and almost nominal sum in full of all demands, making false representations to him as to the medical opinion which had been given about his state. In a subsequent action the Court held that the company was not entitled to use at all, for any purpose or under any circumstances, the document which had been obtained in that way. So if a receipt is given for an amount received in discharge of damage, on the understanding (not expressed in the document) that the person injured should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time, he will not be debarred from suing for damages in respect of injuries which have developed subsequently: *Lee v. Lancashire and Yorkshire Ry. Co.*

L. R. 6 Ch :
527.

Where damages liquidated.
9 App : Ca :
605.

If, however, the damages are in the nature of a liquidated demand, the receipt of a smaller sum will not be a good discharge of the whole: *Foakes v. Beer*.

§ 4. WAIVER OF TORTS.

The question of waiver of torts is an interesting but, in the present day, not a very practical question. It is a point which arises in connection with the distinction between torts and breaches of contracts. It applies, however, only to implied contracts, and the principle may be stated in this form :

Explanation of rule as to waiver.

where the circumstances under which the law will imply a promise and so raise a contract which does not exist in fact, are such as also to fall within the definition of a tort, the party injured may sue in tort, or if he please, may waive the tort and sue in contract on the implied promise. For example, the enjoyment by one man of another man's property, real or personal, may be had without his leave or licence so as undoubtedly to constitute a trespass, but yet "under such circumstances as leave still open, as a reasonable inference, the presumption that it is taken on the terms of payment, just as a man who takes a bun from the refreshment counter at a railway station, takes it on the implied promise to pay for it. So actions of *assumpsit* have been held to lie for the rents of land improperly received under pretence of title: see Bacon's Abridgment, *Assumpsit* (2); *Clarence v. Marshall*, per Bayley, B. (Bowen, L.J., *Phillips v. Homfray*). It will be sufficient to notice one of the extreme cases in which the rule has been applied: *Lightly v. Clouston*. An apprentice had been seduced from on board the plaintiff's ship at Jamaica, and employed by the defendant as a mariner to assist him in navigating his own ship from Port Royal home. An action of tort could have been brought by the master for the seduction *per quod servitium amisit*; he however brought an action of *indebitatus assumpsit* for work and labour performed for the defendant at his request by the apprentice of the plaintiff, to the profits and receipts of whose work and labour the plaintiff was, as the master of the said apprentice, by law entitled. Lord Mansfield said that it was difficult on principle to distinguish the case from those that had arisen on bankruptcies and executions, and in which it had been held that trover might be converted into an action for money had and received, to recover the sum produced by the sale of the goods: and that the practice was beneficial to the defendant, because a jury may give in damages for the tort a much greater sum than the value of the goods: "In the present case the defendant wrongfully acquires the labour of the apprentice:

2 C. & M.
495.
24 Ch : D. at
p. 462.
1 Taunt : 112.
Example from
case of seduc-
tion.

[*Post*, p. 358.]

and the master may bring his action for the seduction. But he may also waive his right to recover damage for the tort, and may say that he is entitled to the labour of his apprentice, that he is consequently entitled to an equivalent for that labour, which has been bestowed in the service of the defendant. It is not competent for the defendant to answer, that he obtained that labour, not by contract with the master, but by wrong; and that therefore he will not pay for it. This case approaches as nearly as possible to the case where goods are sold, and the money has found its way into the pocket of the defendant; "which actions," said Bowen, L.J., "had become familiar to the common law as far back as towards the end of the 17th century: see *Lamine v. Dowell*."

2 Raym: 1216.

Connexion
between rule
of waiver and
rule as to
death.

24 Ch: D. 439.

[ante, p. 25.]

The form of actions being now of no importance, this point would, as we have said, have little practical importance; it throws, however, some light on the application of the maxim *actio personalis moritur cum personâ*. It was argued in *Phillips v. Homfray* that where under the old procedure the tort could be waived and the action brought in contract, the maxim did not apply. We have already pointed out that there is no fundamental difference between torts and contracts so far as this maxim is concerned. It was however necessary to meet the argument from the rule of waiver: and the Court laid down the following rule: "We do not believe that the principle of waiving a tort and suing in contract can be carried further than this—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief." Thus in cases where nothing further appears in evidence but that one person is the owner of land and that another has taken possession of and enjoyed it, an action for use and occupation has been upheld, the inference, in the absence of proof to the contrary, having been allowed to be drawn, that the enjoyment was by permission of the rightful owner: but such cases "according to the better opinion, have been con-

True limit of
rule.

fined to the class of cases where the defendant is not a trespasser setting up an adverse title, but where there are no circumstances that negative the implication of a contract:" consequently in the case it was held that there was no implied contract by the deceased to pay for his wrongful user of the plaintiff's land.

§ 5. THE EFFECT OF BANKRUPTCY ON TORTS.

(1.) *Where the tortfeasor becomes bankrupt.*

The effect of bankruptcy on the liability of a person for his torts is best expressed by quoting sect. 37 (1) of the Bankruptcy Act of 1883:—

Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy. Liability of the bankrupt continues,

The liability for torts therefore continues irrespective of bankruptcy proceedings, and an action for damages will not be restrained: *ex parte Baum, re Edwards*; and the final discharge will not operate as a discharge of any other debts than those provable in the bankruptcy [sect. 30 (2)]: *Johnson v. Skafte*. It would seem, however, to be otherwise if the party injured has waived the tort and sued on the implied contract: *Parker v. Norton*. L. R. 9 Ch : 673.
L. R. 4 Q. B. 700.
6 T. R. 695.

It is to be noticed also that the section only applies to demands in the nature of unliquidated damages: therefore if the damages in tort become liquidated before the receiving order is made, as by judgment being signed in the action, they may be proved for in the bankruptcy, and will be discharged by the order of discharge: *ex parte Brooke, re Newman*. So where the damages are from their nature liquidated the same rule will apply: as in an action for infringement of patent where the relief claimed is an account of gains and profits made by the sale of the infringing article: *Watson v. Holliday*. unless damages have become liquidated:
3 Ch : D. 494.
20 Ch : D. 780.

(ii.) *Where the party injured becomes bankrupt.*

The effect of bankruptcy is, by sect. 44 (1), to pass to the trustees.

All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.

Addison, 5th
ed: p. 36.

In certain
cases right of
action passes
to trustee.

8 Ch: D. 364.

The trustees, therefore, are the proper parties to maintain an action for injuries done to real or personal property, which has become vested in them by reason of the bankruptcy; but they cannot maintain an action for injuries to the person or personal feelings of the bankrupt. They cannot sue, for example, for damages for a libel upon him, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy; nor can they sue for damages for an assault upon the bankrupt, or for the seduction of his servant. And further, if the damages have been recovered by the bankrupt they do not pass to his trustee: he cannot intercept the damages or prevent him from expending them on his own maintenance, unless he has accumulated the money and invested it in property: *ex parte Vine, re Wilson*.

L. R. 1 Ex:
313.
Rule as to
trustees identical
with
rule as to
executors.
[ante, pp: 29 et
seq.]

This rule, however, is to be strictly applied to injuries which have not affected the bankrupt's estate: therefore, where a declaration alleged a false representation whereby the plaintiff was induced to make certain advances and payments of money, it was held that the right to sue passed to the trustees: *Hodgson v. Sidney*. The trustees of a bankrupt, like the executors of a deceased person, represent the estate, and it will be seen that practically the principles which apply to the trustees are identical with those which apply to executors which have already been considered.

§ 6. THE EFFECT OF MARRIAGE ON TORTS.

(i.) *Where the tortfeasor marries.*

The effect of marriage on the torts of a woman committed before her marriage is dealt with by the Married Woman's Property Act, 1882. By sect. 13 it is provided that a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all wrongs committed by her before her marriage: and she may be sued for any liability in damages or otherwise in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such wrongs, and for all damages or costs recovered in respect thereof.

Married woman liable for ante-nuptial torts to the extent of her separate property.

And by sect. 14 it is provided that a husband shall be liable for all wrongs committed by his wife before marriage, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him in respect of any ante-nuptial liability of his wife: but the husband shall not be liable for ante-nuptial wrongs any further or otherwise.

Husband liable for wife's ante-nuptial torts to the extent of property received from her.

(ii.) *Where the injured party marries.*

With regard to the effect of marriage on torts committed against a woman before marriage, sect. 1 (1) of the same Act provides that a married woman shall be capable of suing and being sued in tort or otherwise, in all respects as if she were a *feme sole*; and any damages or costs recovered by her in any such action or proceeding shall be her separate

Married woman may sue for torts; damages becoming her separate property.

property. And this presumably relates as well to torts committed against her before, as to those committed after, her marriage.

[*post*, p. 44.]

Torts committed by married women will be considered under the head of Tortfeasors.

CHAPTER IV.

Of Tortfeasors.

To the general principle that a person is liable civilly for his torts there is no exception. The protection which the law affords to infants, married women (1), lunatics, and drunkards in respect of their contracts is not extended to their torts, nor is there any analogy between the rules of exception depending on the criminal law, and the rules as to tortious liability.

Any exception to this general rule will be found traceable to the principle discussed in the chapter on *Mens Rea*, that no liability attaches to an involuntary act: and the subject of lunatics and drunkards will be postponed to that chapter. [Chap. VII.]

In this chapter we propose to consider the law with regard to tortfeasors generally, including thereunder the liability of certain people for the acts of others, and for the consequences which may result from the possession of certain kinds of property. In the case of a tort committed by a servant, the master is in the eye of the law a tortfeasor: and so is the owner of a wild animal who has bitten a passer-by. The main principles discussed, under the general head of tortfeasors, will therefore be:

The liability of certain people for their own acts. [§§ 1, 2, 3, 4, 6.]

The liability of certain people for the acts of others. [§§ 5, 7.]

The liability of certain people as owners of mischief-causing property. [§§ 8, 9.]

(1) The case of married women is however not free from difficulty: see *post*, p. 44.

§ 1. INFANTS.

Infants are
liable for
torts,
8 T. R. 335.

unless the
action is really
based on con-
tract.

14 C. B. N. S.
45.

1 Sid : at
p. 129.

In general, as we have said, the plea of infancy constitutes no defence to an action of tort: "If an infant," said Lord Kenyon, C.J., in *Jennings v. Rundall*, "commit an assault or utter slander, God forbid that he should not be answerable for it in a Court of Justice." A difficulty must inevitably arise, however, from what we have already hinted, as to the very great difficulty of distinguishing accurately between torts and contracts. For many breaches of contract an action in form *ex delicto* could be brought: but it was laid down in the case just cited, that if the action were really *ex contractu* it should not be turned into one *ex delicto* for the purpose of avoiding by a technicality the efficacy of the plea of infancy. The plaintiff in the case declared that at the defendant's request he had delivered a mare to him to be moderately ridden, and that the defendant maliciously intending, &c., wrongfully and injuriously rode the mare so that she was damaged. The Court held it was clearly a case of contract, and that the words "wrongfully injuriously and maliciously" in the declaration could make no difference. But where an undergraduate contracted with the plaintiff for the hire of a mare, he being told at the time that it was not let for jumping because the charge would be different, and he lent it to a friend who staked it, it was held that a wrong had been committed quite independent of the question of necessities which would arise on the plea of infancy, and that it was a trespass not within the object and purpose of the hiring. Therefore, notwithstanding the general principle which was noticed by the judges that by suing *ex delicto* the plaintiff could not change the nature and extent of an infant's liability, the plaintiff recovered the value of the mare: *Burnard v. Haggis*. On the same principle, if an infant enters into a contract with respect to goods, and they are delivered to him, he will not be held liable in trover and conversion for them: *Manby v. Scott*. "For in this way all the infants in England would be ruined."

Where therefore the contract has been induced by fraud, as in *Bartlett v. Wells*, more especially if the fraud be the representation that the contracting party was of full age, an action for deceit or fraudulent misrepresentation will not lie. This principle has been acted on in several cases. As in *Johnson v. Pye*, and *Price v. Hewett*, where a loan was obtained by an infant in this manner: *Green v. Greenbank*, where an infant sold a horse warranting it sound: and *Grove v. Nevill*, where the sale was of another's goods, the infant representing them as his own:—"The defendant pleads nonage at the time of sale. To which the plaintiff demurred: and by Crofts, this being a tort as waste or escape, nonage is no plea. *Sed curia contrà*. This being no actual tort, or anything *ex delicto*, but only *ex contractu* which is voidable by plea. But it's a tort by construction of law. Windham doubted."

Not liable for fraud inducing contract.
1 B. & S. 836.

1 Sid: 258.

8 Ex: 146.

2 Marsh: 485.

1 Keb: 778.

This rule may be put in another form: "Where the substantial ground of action rests on promises, the plaintiff cannot by changing the form of action render a person liable who would not have been liable on his promise."

A distinction was, however, taken in *Mills v. Graham*. The plaintiff sent some skins to the defendant to be finished at a certain price. The defendant refused to re-deliver them, alleging infancy. Lord Mansfield held that as there could be no bailment on this account, the goods had been wrongfully in the defendant's hands from the beginning, and that an action for detinue could be brought. It must be confessed that the distinction is not very clear, because the fact that the transaction had been induced by fraud was expressly recognised. In *Bristow v. Eastman* an infant had embezzled money, and Lord Kenyon held (apparently on a principle, the converse of that laid down in *Grove v. Nevill*), that an action for money had and received would lie to recover it: because although the action was in point of form *ex contractu* yet in substance it was *ex delicto*. In this case too it was said that "if an action of trover had been brought for any part of the

1 B. & P:
N. R. 140.

1 Esp: 172.

but liable in action of contract if it is in substance for a tort.

Results of
joint and
several lia-
bility.

No indemnity,
8 T. R. 186.

1 Camp: 344-
unless by
special agree-
ment.

Judgment
against one a
bar to action
against others.

Cro: Jac: 73.

Reasons for
the rule.

13 M. & W.
504.

It follows from the rule of joint and several liability, that if one joint-tortfeasor alone is sued, he has no right of action for indemnity over against his co-trespassers: *Mereweather v. Nizam*. Nor, if all are sued and all the damages are levied against one, is there any right of contribution from the others: *Farebrother v. Ansley*. Unless, of course, there is an express agreement to indemnify; but this will not be implied from the mere fact of employment, or where one commits a trespass at the request of another. That is to say, the master and servant being both trespassers, the servant cannot sue the master for indemnity; but if the servant has committed the trespass and the master has been held liable, he may sue the servant: but this is not a case of indemnity.

So if an action is brought against one of several joint tortfeasors, and judgment recovered, it will be a bar to an action against the others, although the judgment is not satisfied.

This was laid down in *Brown v. Wootton*, in which the defendant pleaded judgment recovered against a co-trespasser: "All the Court held the plea to be good; for the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatam* and to a certainty." And Popham, C.J., added: "If one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass." This case was approved in Baron Parke's elaborate judgment in *King v. Hoare*. The reason "that the damages are reduced to a certainty," which lies at the root of the maxim *transit in rem judicatam*—that the cause of action is changed into matter of record, which is of a higher nature, and the inferior is merged in the higher—was held as applicable to the case of joint defendants as to a sole defendant. Another reason is that although there are several defendants there is but *one cause of action*. "The judgment of a court of record

changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two." These two cases were again discussed in *Brinsmead v. Harrison*, and a third reason advanced in support of the rule, "if it were held not to be a defence, the effect would in the first place be to encourage any number of vexatious actions, whenever there happened to be several joint wrongdoers," a principle which we shall find frequently acted on by the Courts. (See also *Buckland v. Johnson*.) On the same ground in *Cooke v. Jenner* it was held that a release of one joint-tortfeasor releases all: "For though a trespass be joint and several to this purpose that he may sue either one or all, yet when two join in a trespass, they so make one trespasser, as either of them is as well answerable for his fellow's act as for himself. And therefore a release to one dischargeth the whole trespass, and also a release is as good a satisfaction in law as a satisfaction in deed."

L. R. 7 C. P.
547.

15 C. B. 145.
Hob: 66.

Release of one
releases all.

A very important consideration of course arises when there are several tortfeasors, in determining whether they are strictly joint, in order that the rules just considered may be applied. For example, where a libel has been successively repeated, an action will lie against each of the persons who have circulated it; they are several tortfeasors *and not joint*. (See *Martin v. Kennedy* and *Nicoll v. Glennie*.)

Case of several, but not joint, tortfeasors.

2 B. & P. 69.
1 M. & S. 592.
[*Port*, pp. 312,
328.]

§ 4a. CONSPIRACY.

The action for conspiracy, so called, is only a special case of joint tortfeasors.

Conspiracy a special case of joint tortfeasors.

The history of the old writ of conspiracy is ably discussed by Mr. Bigelow [*Leading Cases*, p. 210]; and the modern doctrine is well summarised by him as follows: The effect of *Hutchins v. Hutchins* is that the fact of conspiracy becomes actionable only when the act would be a ground of suit if done by a single person. "It is clear," says the Court in *Kimball v. Harman*, "as well upon the authority of other cases as

[p. 214.]
7 Hill (U.S.)
104.

34 Maryland
Rep: (U.S.)
407.

1 Rayn: 374.
Gist of the
action of con-
spiracy is the
tort.

that of *Savile v. Roberts*, that an act which, if done by one alone, constitutes no ground of action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." And, *e converso*, if the act is unlawful when committed by one, it will be unlawful when committed by a combination of several; as in the case of a conspiracy (carried out) for a malicious prosecution.

6 M. & G.
205.

For example, in *Gregory v. Brunswick* it was held that an action lay against several for a conspiracy, carried out, to hiss an actor off the stage. Mr. Ball [Leading Cases, p. 164] points out as the ground, that it is a distinct tort maliciously to interfere with another's trade or occupation; and that the conspiring would in fact be the evidence of malice, which it might be difficult to prove in the case of a single member of the audience. The concession made by Mr. Ball against this last case being a cause of action, assuming it to be proved, seems, however, unnecessary if the prior assumption is accurate.

Distinction
between con-
spiracy crimi-
nally and
civilly.

1 Saund: 228.

The distinction between conspiracy in criminal law and the common law action against two or more for combining to commit a tort, thereby becoming joint tortfeasors, was pointed out in *Skinner v. Gunton and others*. It was argued that here is an action of *conspiracy* which charges the defendants that, *per conspirationem inter eos habitam*, they caused a plaint to be levied, and the now plaintiff to be arrested thereon, and all the defendants except one (namely, Gunton) are acquitted, and therefore this action fails; for one defendant cannot conspire alone: "and although the plaintiff might have had *an action upon the case* against the three defendants, or one defendant only," yet he had chosen "*an action of conspiracy*." But the Court held nevertheless that "*it was an action on the case*, and therefore the plaintiff should have judgment against the defendant whom the verdict is found against, although the other two defendants are acquitted. For the substance of the action was the *undue arresting* of the plaintiff, and not the *conspiracy*."

We proceed now to consider other special cases of joint tortfeasors, which arise out of the relations of master and servant, principal and agent, and contractor and sub-contractor.

§ 5. PRINCIPAL AND AGENT—MASTER AND SERVANT.

In their main features the principles which regulate the liability of a principal for the torts of his agent, and of a master for the torts of his servant, are identical; a liability which is usually expressed by the maxim *qui facit per alium facit per se*. And, first, it is naturally of the greatest importance to establish the existence of either relation between the party against whom the action is brought and the actual tortfeasor. If this fails the action can only end in a nonsuit. As in *Lucas v. Mason*. During a disturbance at a public meeting, the chairman cried out "Bring those men forward:" and the stewards, acting on the suggestion, brought the wrong man forward and ejected him. In an action against the chairman for the assault, the Court held that it was impossible to say that any such relation existed; and judgment was therefore given for the defendant. They held also that the words could not be construed into a command, so as to bring the chairman within the rule that where the trespass is the necessary and direct consequence of an order given for its committal, the person who gives the order is liable as much as if he did it himself. Thus in *Glynn v. Houston*,² an action for assault and false imprisonment against the Governor of Gibraltar, some soldiers under the command of the Military Secretary searched a house for a Spanish General, and putting a sentry at the door of the plaintiff's house refused him egress. There being evidence that the search was made under the Governor's authority, he was held liable.

Important to inquire if relation actually exists.

L. R. 10 Ex: 251.

2 M. & G. 337.

(i.) *Consideration of master's liability where the authority is to do a specific act.*

Simple illustration of liability.

2 Lev: 172.

¹ 2 M. & Ry:

2.

² 5 Esp: 262.

³ 5 Esp: 36.

⁴ 2 H. Bl: 442.

7 H. & N. 355.

Liable if order executed with violence ;

or where restriction is difficult to comply with.

9 B. & C. 951.

In illustration of the simple case of the liability of the master or principal, the following decisions may be cited. *Michael v. Alestree*, where the servant was sent to train some unruly horses in Lincoln's Inn Fields, and in so doing ran over the plaintiff. The master was held liable. In all the carriage cases, which will be examined more particularly hereafter, the master of the coachman was held responsible for the damage occasioned by his negligence: the difficulty in the cases arising always as to determining who was in reality the master at the time of the accident. Simple instances also occur in *Smith v. Lawrence*,¹ *Sammell v. Wright*,² *Dean v. Branthwaite*,³ and *Morley v. Gaisford*.⁴ So too the master is liable if the servant has executed his orders with unnecessary violence or wantonly: *Seymour v. Greenwood*; and also although he has performed his duty with ordinary care but has unavoidably disobeyed his instructions, and the tort is the necessary or unnecessary consequence of them. As where the servant was told to lay a quantity of rubbish near a neighbour's wall, but so that it might not touch it. The restriction being difficult to comply with, some of it ran against the wall, and the master was held liable: *Gregory v. Piper*.

But although the master is responsible for the negligence of his servant, while executing his orders, it is not true to say that he is responsible for all the acts of his servant: and an inquiry is therefore necessary as to the master's liability where the servant has exceeded his orders, or has done something without any order at all; this inquiry is generally couched in the words "was the act within the scope of the servant's employment or authority?"

In some cases the circumstances themselves afford a very simple solution of the difficulty. For example, where the master is present at the time of the accident his presence may

under certain circumstances justify the assumption that he had control over the servant, or that he acquiesced in his acts. As in *Chandler v. Broughton*, where the master was sitting on the box of the carriage with the servant when the collision happened. (See also *McLaughlin v. Prior*.)

1 C. & M. 29.

[*post*, p. 83.]

Now although as we have seen the master is responsible if his order is carried out with unnecessary violence, it being held to be still within the scope of the servant's employment, he is not responsible if the trespass is the result of some direct act of malice on the part of the servant, which would disconnect it with the work upon which he was employed, although it occurred during the time in which he was being employed. For example, if in driving, whether the master be present or not, the servant wantonly strike another's horses, the master is not liable; but if in order to perform his master's orders he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligence within the scope of his employment, and the master will be liable: *Croft v. Alison*. This point was also decided in *McManus v. Crickett*, in which the judgment of Holt, C.J., in *Middleton v. Fowler* was cited with approval. No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him. Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act. As in the example given in Noy's maxim: "If my servant contrary to my will chase my beasts into the soil of another, I shall not be punished; or if I command my servant to distrain and he ride on the distress, he shall be punished, not I."

Not liable for direct act of malice.

4 B. & Ad: 590.
1 East 106.
Salk: 282.

It is important to keep this principle quite distinct from that laid down in *Limpus v. General Omnibus Co.* The facts of that case were shortly as follows: the driver of the defendant company's omnibus, being instructed to do the best he could

1 H. & C. 526.

Illustration of

scope of
employment.

[ante, p. 55.]

1 East 106.

Master liable
if act is in
furtherance
of his
interests.

* [An action lies
in respect of this
'nursing.' The
form it takes is,
however, for an
injury to the in-
dividual arising
from an obstruction
to the high-
way (cf. p. 153 :
*Green v. London
General Omnibus
Co.*, 29 L. J.
C. P. 13.)]

[post, p. 59.]

for his master in the way of picking up fares, was also directed to drive steadily and not to interfere with any other omnibus driver; he, however, pulled across a rival omnibus in order to obstruct its conductor in getting passengers, and in so doing drove against and upset it. Wightman, J., thought these facts brought the case within *Croft v. Alison*; but the rest of the Court (Williams, Crompton, Willes, Byles, and Blackburn, JJ.) thought that they did not, and held the defendant company liable. The judgments proceed on two distinct lines of argument. First, what was done happened in the course of the driver's employment: the mere fact that instructions are given and are disobeyed will not excuse the master from liability; we have already seen examples of this. And on this point it is to be noticed a distinction exists between this case and *McManus v. Crickett*: the wilful act there was the wrecking of the plaintiff's carriage, here it was the driving across it ("nursing" technically).* Secondly, the driver was employed to get as much money as he could for his master, in rivalry with other omnibuses: what he did was clearly in rivalry, and therefore again within the course of his employment; moreover, what he did was done for his master's benefit.

The question put to the jury by Martin, B., was: Did the driver act recklessly in his service, and do what he did for the interest of his master? This was approved by Blackburn, J., who enunciated the following propositions. The master is liable for an act of his servant even if it is wilful provided it was within the scope of the servant's employment, and in the execution of the service for which he was engaged. If it was an act of his own and in order to effect a purpose of his own; or if it was not to further his master's interest, but from private spite, then the master is not liable.

This principle will be found to be very analogous to that laid down in a series of railway cases proceeding on the authority given to a company's servants to arrest people under certain circumstances.

The principle of non-liability for a servant's wilful act in the above driving case, is sometimes said to depend on the consideration that for the time being the servant must be supposed to have borrowed the carriage: and although this may appear to be somewhat crude, there are a series of cases in which the servant has undoubtedly borrowed his master's carriage, and in which the master has been consequently exonerated from liability. In *Joel v. Morrison* the rule was said to be that if a servant borrowed his master's cart for his own business, the master would not be liable; but that if when he was out on his master's business he made a detour on his own, the master would still be liable. A somewhat narrow distinction lies between this case and *Storey v. Ashton*, in which a wine merchant's carman and clerk went out in a van to deliver wine and return with empties. On their way home, having finished their work, they went out of their way on the clerk's business. An accident happened through the carman's negligence, and it was held that the master was not liable. The question was said to depend not on the mere fact of taking a longer road, which of itself would not be sufficient to remove the act from the scope of employment, but on how far the deviation could be called a separate journey. A still stronger example is to be found in *Rayner v. Mitchell*. A carman without permission took his master's cart out for his own business; having finished that, he collected a few empties, which was within his usual employment, and while he was so employed, an accident happened. Having started on his own business, the Court held that he was clearly acting beyond the scope of his employment.

Master not liable where servant borrows his property.

6 C. & P. 501.

L. R. 4 Q. B. 476.

2 C. P. D. 357.

In *Venables v. Smith* the true relation of a cab proprietor to the driver, although apparently that of bailor and bailee, was held to be that of master and servant, with authority to use the cab entirely at the driver's own discretion. Consequently when an accident happened while the driver was returning to stable, but when he had gone a little further to a tobacco-nist's, the proprietor was held liable.

2 Q. B. D. 279.

Case of a cab-driver and proprietor.

Another instance of the application of the rule that the master is not liable for an act of his servant the doing of which had emanated entirely out of the servant's brain is the case of *Lyons v. Martin*. The servant had authority to distrain cattle damage feasant; he drove some beasts from the highway into his master's close and then distrained them. The master was held not liable. For if he is not liable when the original act of the servant is not unlawful (as merely borrowing his master's cart), *à fortiori* he is not liable when the act is unlawful, as in this case.

[*ante*, p. 54.]
But master
cannot limit
his liability by
issuing orders
which cannot
be obeyed.
L. R. 3 Ch:
441.

But on the other hand, as it was held in *Gregory v. Piper*, the mere fact that the master has endeavoured to limit his liability by issuing orders which it is almost impossible for the servant to obey will not excuse him. *Betts v. De Vitre* affords a good illustration of this. The action was for infringement of patent. The master, knowing that they were running very close, had issued express orders to the workmen not to infringe the plaintiff's invention; these orders had nevertheless been disobeyed. The Court held that although the disobedience might have been unknown to the master, yet he was liable, because the infringement had occurred in the course of the performance of proper duties by the workmen. "Those who have the control," said Lord Chelmsford, "of the working are responsible for the acts of subordinates; and it is not sufficient for them to order that the work shall be done so that no injury shall result, they are bound to see that their orders are obeyed."

(ii.) *Consideration of master's liability where the authority is to do acts of a certain class.*

Liability
where autho-
rity is to do a
certain class
of acts.

So far we have considered only cases in which there has been authority to do an express act and this authority has been exceeded. The question becomes more complicated when the authority is to do a certain class of acts, and it has to be determined whether the act done falls within that class.

Some examples drawn from a group of railway cases will best illustrate the principles on which the master's liability depends. They are actions brought against the company for a false imprisonment by one of its servants.

The liability depends upon an authority expressly given in the bye-laws or instructions to arrest or detain people under certain circumstances, the general principle being that if the person has been arrested under circumstances falling within this authority, and the charge is unfounded, the action will lie against the company; they are liable for the mistake, because the servant is clothed with an authority to decide as the exigency arises what shall be done; but if the circumstances do not fall within this authority, then that the action will not lie against the company. Thus in *Moore v. Metropolitan Ry. Co.* the station-master, wrongly assuming that a passenger had not paid his fare, detained him. There was authority to act in such a manner, and therefore the plaintiff succeeded against the company. But in *Walker v. South Eastern Ry. Co.*, a constable in the company's service gave a person into custody after a scuffle in the station-yard. His instructions were that he was to give no one into custody if the scuffle were over before he interfered. The verdict was for the company, because there was no authority to do what was done, nor any authority to exercise a certain discretion in the matter. And, again, in *Poulton v. London & South Western Ry. Co.*, where the detention was for non-payment of the fare for a horse, the plaintiff failed against the company. Not only was there no authority to the servant to act in such a manner, but such authority could not have been given, for the company had no power to do what their servant did, and therefore there could be no implied authority.

Where servant must decide how to act, master liable, if he has authorised the exercise of discretion.

L. R. 8 Q. B. 36.

L. R. 5 C. P. 640.

L. R. 2 Q. B. 534.

Not liable if act is one which master himself could not commit.

In *Goff v. Great Northern Ry. Co.* the general principle governing these cases was laid down: where a company has on the spot a person acting as their agent, that is evidence to go to the jury that he had authority from them to do all those things on their behalf which are right and proper in the

30 L. J. Q. B. 148.

7 H. & N.
355.

exigencies of their business: all such things as somebody must make up his mind on behalf of the company whether they should be done or not: if he makes a mistake or commits an excess while within the scope of this authority his employers are liable. So in *Seymour v. Greenwood*, where the guard of an omnibus had authority to remove offensive passengers from his omnibus: in the exercise of that authority he had committed an excess: the Court held the master liable, because in giving the conductor such an authority, he necessarily gave him authority to determine whether any passenger had misconducted himself.

Non-liability
does not depend
on
absence of
authority to do
the precise
act.

L. R. 9 C. P.
575.

It is very essential to notice that in all these cases where the company has been held not liable, the decision has proceeded on the broad ground that the act was not within the scope of the servant's authority (in one case, because no authority could be implied to do an act which the master himself could not do), and not on the narrow ground that there was no authority given to commit the wrongful act. As many of the cases point out, a certain latitude of decision as to the expediency of the act must be left to the servant, and by this decision his master is bound. A few cases will be found (e.g. *Bolingbroke v. Swindon Local Board*) in which the non-liability of the master has been expressly determined on this narrow ground that there was no authority to commit the actual act of trespass: these cases cannot now be considered as good law.

L. R. 8 C. P.
148.

Bayley v. Manchester Ry. Co. emphasizes this important distinction. The plaintiff was pulled out of a train by a porter who thought (erroneously as it turned out) that he was in the wrong train: he fell and was injured. It was the porter's duty to prevent people travelling in a wrong train, and he thought he was doing his duty in getting a passenger out by the means he adopted. It was proved that he had express orders not to remove passengers: but the two orders were somewhat conflicting, and, while acting in the performance of the general duty cast upon him, he neglected the particular

direction as to the mode of doing it. He was held still to be acting within the scope of his employment and the company was liable. The following rule was laid down: "When a servant is acting within the scope of his authority, and in so acting he does something negligent or wrongful, the employer is liable, even though the acts done be the very reverse of that which the servant was directed to do."

Master may be liable for acts the opposite of what he has ordered.

The rule in this section is therefore the same as in the preceding section, with this addition, that the determination whether the act comes within the authority is practically left with the servant.

(iii.) *Consideration of master's liability where the authority is general, or in the absence of express authority.*

In the first two divisions of the subject it is clear that it is immaterial whether we use the expression master and servant, or principal and agent, the only question being the amount of authority given. The same remark applies to this third division, the difficulty of determining the true limit of authority being, however, rather more difficult in the case of a servant than in the case of an agent.

It will be understood that the questions coming under this third division are, the liability generally of a master for the acts of his servant irrespective of actual authority; and the liability of a principal for the acts of an agent employed to represent the principal, where the authority is general to do all acts necessary to the conduct of his business.

In *Allen v. London & South Western Ry. Co.* a ticket clerk in charge of the till gave a person into custody whom he suspected of having attempted to rob the till. The Court considered that the clerk had an implied authority to do anything to protect the company's property; and that if he could not prevent the theft otherwise than by acting as he did, it would have been within the scope of his employment. But what he did being simply to punish the offender for a sup-

L. R. 6 Q. B. 65.

Master not liable where act is clearly outside scope of duty;

posed attempt to steal, it was held impossible for the company to be responsible for the act when the charge turned out to be unfounded. So where a foreman porter in charge of a station gave a person into custody on suspicion of stealing the company's goods, it was held that he had acted not within the ordinary course of his business, nor for the company's benefit, but from a sense of duty which he imagined was cast on everyone to give people in charge on suspicion; and that therefore the company could not be coupled with him in his wrongful act: *Edwards v. London & North Western Ry. Co.*

L. R. 5 C. P.
445.

but duty will
be assumed to
include certain
acts for
master's bene-
fit.

L. R. 3 C. P.
422.

In these two cases the authority to arrest would have been assumed if the facts had disclosed a proper case for the exercise of the clerk's discretion in the discharge of his duty to protect the property committed to his care.

In *Whatman v. Pearson*, a workman, in violation of his instructions, left his horse and cart unattended in the street before his door when he went home to his midday dinner. The horse ran away and injured the plaintiff; it was held that he was acting within the scope of his employment, because he had been guilty of negligence in the care of the horse entrusted to him.

Generally,
liability de-
pends on
connection
between the
servant's work
and the tort
committed.

These three cases cover the whole ground of what may be called the pure master and servant cases. The first two turn on the implied authority to take all steps necessary to protect property committed to the servant's care, the third on the presumed command to do the work properly and without negligence: but in all three there is a connection between the tortious act and the work undertaken by the servant: in other words, the tort flows directly out of the employment.

If the tort does not flow out of the employment, then the master is not liable.

For example, if a porter in carrying a passenger's luggage injures somebody standing on the platform, the injury flows immediately from the usual occupation of the porter, and the company would be liable. But suppose a booking clerk carries the luggage and injures somebody in the same way,

then the injury would not flow immediately from the occupation for which the clerk was employed, and the company would not be liable.* (See *Milner v. Great Northern Ry. Co.*)

50 L. T. 367.

If then I am to be liable for the tort of my servant, the preliminary inquiry must always be, what have I engaged the servant to do? If, to take a homely example, my housemaid so negligently lights my fire that my neighbour's house is burnt, I am without doubt liable: but if the same injury were to result from the act of my coachman, I should, without doubt also, not be liable.

* [i.e. supposing the several duties strictly proved. If the duties are not kept quite distinct, and the company knows of this, then there is evidence to go to the jury that what was done was within the scope of employment.]

So in cases of principal and agent, the inquiry is practically the same; for what general purposes does the agency or employment exist, and what acts can be presumed to be authorized in consequence?

Petrie v. Lamont, which we have already noticed on page 48, is a good illustration of this; the inquiry was whether one partner in a firm was so much the agent of the other partners, or of the firm, as to involve them in the consequences of a tort which he had himself committed. It was held that he was not.

Car: & M. 96.

But from the relation of principal and agent there has arisen a large class of cases where fraud has been committed by the agent, a question which hardly arises out of the relation of master and servant. These cases are usually fraudulent misrepresentations made by bank managers, or false statements in prospectuses issued by the secretary of a company; and it becomes necessary to inquire how far the principal can be made liable for this fraud.

Fraud:

In *Mackay v. Bank of New Brunswick*, it was part of the manager's duty to obtain the acceptance of bills in which the bank were interested: he fraudulently sent a telegram, without the knowledge of the directors, making a representation to A., which, by omitting a material fact, induced A. to accept a bill. It was clearly within the scope of his duty, and the bank was held liable in an action of deceit. On this

L. R. 5 P. C. 394-

e.g., fraudulent misrepresentation by bank manager.

[cf. p. 46.]

L. R. 1 Sc:
App: 145.
General prin-
ciple of lia-
bility.

L. R. 2 Ex:
259.

Judgment of
Willes, J., in
Barwick's
case.

point the case somewhat conflicts with some *dicta* as to the liability of corporations in the House of Lords in the *Western Bank of Scotland v. Addie*, but the general law as to the liability of a principal was laid down as follows:—"It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond the scope of the agent's authority in the narrowest sense of which the expression admits. But, for obvious reasons, a wider construction has been put on the words, and principals have been held liable for frauds when they were unauthorized either particularly or generally: at the same time it is not easy to define with precision the extent to which this liability has been carried." The best definition was said to be found in the case of *Barwick v. English Joint Stock Bank*. In that case the plaintiff was induced to continue supplying oats to a customer of the bank, a contractor with the Government, on a guarantee from its manager to the effect that the customer's cheque in the plaintiff's favour, in payment for oats supplied, should be paid on receipt of the Government money in priority to any other payment "except to this bank." The fact that the customer was largely indebted to the bank was concealed. Practically, therefore, the plaintiff was induced to advance money to the customer on a guarantee which turned out to be worthless, and which the manager must have known to be worthless when he gave it. The judgment of the Exchequer Chamber was delivered by Mr. Justice Willes. "With respect," he said, to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the

servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. The principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo: *Ewbank v. Nutting*. It has been held applicable to actions of false imprisonment (in the cases we have already considered). "It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong: *Huzzey v. Field*. In all the cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." The decision has never been questioned; but the arguments on which it was based were severely criticised by Bramwell, L.J., in *Weir v. Bell*. Willes, J., declared that no sensible distinction could be drawn between the case of fraud and the case of any other wrong; but, as Bramwell, L.J., pointed out, there is a very obvious distinction, for fraud is always wilful. The principle of all the cases cited by Willes, J., was that the act complained of was within the scope of the servant's authority or employment. In none of them was there any wilful disregard of that authority.

An explanation of *Barwick's case* has, however, been suggested, based on the fact that the principal had benefited by his agent's fraud.

In *Udell v. Atherton* the plaintiff had paid twice the real value of a log of mahogany, being induced to do so by false statements of the defendant's agent, and he brought an action of deceit against the principal. It was clear that if the fraud had been discovered before the log had been cut, the contract

7 C. B. 797.

[*ante*, p. 59.]

2 C. M. & R. 432.

Questioned by Bramwell, L.J.,

3 Ex. D. 238.

because fraud is always wilful;

[*ante*, p. 64.]

but liability for agent's fraud is only to extent of benefit.

7 H. & N. 172.

could have been rescinded, because the principal could not hold the price and ignore the statements on which it was founded. But with regard to the action of deceit, the Court was equally divided: Pollock, C.B., and Wilde, B., holding that it would lie against the principal, Martin and Bramwell, BB., holding that it would not. The plaintiff having been nonsuited at the trial, the rule *nisi* for setting aside the nonsuit was consequently discharged. "In an action upon the contract," said Martin, B., "the representation of the agent is the representation of the principal, but in an action on the case for deceit, the misrepresentation or concealment must be proved against the principal."

[ante, p. 63]

In *Mackay's case*, however, it was expressly held that an action of deceit would lie, wherein the fraud of the agent would be correctly stated, for the purposes of pleading, as the fraud of the principal.

In the case, therefore, in consequence of this difference of opinion, the principal who had benefited by his agent's fraud was held not liable to refund the benefit he had received, but only to rescission of the contract induced by the fraud; this, however, the plaintiff unfortunately could not avail himself of, as the log of mahogany had been cut up.

L. R. 2 Ex:
259.

L. R. 5 P. C.
394.

But both in *Barwick's case* and *Mackay's case* the principal had profited, and was held liable to refund in consequence; this rule "has been so much approved and followed, that it has become part of the law, and it is undoubtedly a most useful and convenient rule that principals should be responsible for damages occasioned by the fraud of their agents acting within the scope of their authority, at least to the extent of the gains of the principal, especially now that so much of the world's business is carried on by corporations."

The importance of the inquiry whether the principal has benefited by the fraud was dwelt on by Cockburn, C.J., in 3 Ex: D. 238. *Weir v. Bell*; and by Lord Coleridge, C.J., in *Swift v. Jewsbury*. The decision of the Court that the principal was not liable, said Lord Coleridge, did "not at all conflict with

L. R. 9 Q. B.
301.

Barwick's case and cases of that description which have been brought before us, because I apprehend that there can be no doubt that a different set of principles altogether arises where an agent of a joint stock company, in conducting the business of the joint stock company, does something of which the joint stock company take advantage, and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act. Justice points out, and authority supports justice in maintaining, that where a corporation takes advantage of the fraud of their agent [even in ignorance], they cannot afterwards repudiate the agency and say that the act which has been done by the agent is not an act for which they are liable." The facts of *Swift v. Jewsbury* (*Swift v. Winterbotham* in the Court below) were as follows:—A customer of a bank requested the manager to inquire for him as to a person's credit; inquiry was made at this person's bank, and the manager of it replied in his own name, signing his letter as manager, and giving a favourable account of the credit, which account was false to his knowledge; on the faith of it goods were supplied which were never paid for. The principal arguments in the case were based on the Act of 9 Geo. IV. c. 14, s. 6, which requires a representation as to the credit of another person to be made in writing, and that the signature to the letter could not be considered the signature of the company. On the strict construction of the statute it was held it could not be so considered.

L. R. 9 Q. B.
301.

L. R. 8 Q. B.
244.

Case of company not liable where no benefit accrued.

There was no express authority from the directors of the bank to their manager to write the letter. The Queen's Bench held that the writing of it was within the scope of his general authority in the conduct of the affairs of the bank. The Exchequer Chamber held that he had answered the letter as a private individual, and consequently was himself personally and solely liable. The bank moreover had not profited by the fraud.

Example of act held not to be within authority.

In *Barwick's case* the guarantee given by the manager was

3 Ex: D. at
p. 245.
Principle of
warranting
agent.

held to be an act within the scope of his employment, and Bramwell, L.J., said in *Weir v. Bell*, that the case could be supported on the ground that "every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract" (1).

Two prin-
ciples deduci-
ble.

It is fairly clear, however, that there are two distinct principles running through the cases: liability for the fraud of an agent from which the principal has benefited; liability for the fraud of an agent when he does some act within the scope of his employment, irrespective of benefit received.

5 App: Ca:
317.

In *Houldsworth v. City of Glasgow Bank*, Willes, J.'s judgment was again approved in the House of Lords: and whatever that case did in fact lay down may be now considered to be the law. Some interpretations of it are in favour of the former principle only, which makes the liability flow from, and equal to, the benefit received.

Master is
liable for
benefit re-
ceived.

This much at least is clear: that if a benefit has been received by a master from a fraudulent act of his servant outside the scope of his employment, he will be held liable for the fraud to the extent of the benefit received.

The real difficulty arises when the fraudulent act is within the scope of employment, and the master has not received any benefit therefrom.

Principles of
firm's liability
for fraud of
partner

It must be confessed that the rules as to the liability of a firm for the fraud of the partners would seem to suggest a liability in this case also. The three most important rules given by Lord Justice Lindley are as follow:—

[Law of Partner-
ship, I., p. 303.]

If a partner in the course of some transaction unconnected with the business of the firm obtains money and then misapplies it, the firm is not thereby liable to make good the loss: but

Where a firm in the course of its business receives money belong-

(1) It is exceedingly difficult to reconcile this dictum, which was intended to be consistent with the learned judge's opinion in *Udell v. Atherton*. If it is consistent with that opinion it applies only to actions on the contract: but *Barwick's case* was an action for false representation simply.

ing to other people, and one of the partners misapplies money whilst it is in the custody of the firm, the firm must make it good : and,

Where one partner, acting within the scope of his authority, as evidenced by the business of the firm, obtains money and misapplies it, the firm is answerable for it.

These rules seem to be entirely independent of any benefit received by the firm. are independent of benefit.

But the principle of benefit does not seem to require a benefit to have been actually received, so long as the act was done *for the benefit* of the principal, and within the scope of employment ; and this was undoubtedly the case in all the partnership cases. Willes, J.'s rule is liability for fraud within authority, and *for* the principal's benefit.

And this seems to be precisely the rule laid down by Willes, J. : "The general rule is that the master is answerable for every such wrong of the servant or agent, as is committed *in the course of the service* and *for the master's benefit*." Whenever the case has been approved it will be found that this sentence is always quoted. It does not make him liable for every fraud. If the deduction is sound the general rule embracing both these propositions would seem to be as follows :— [ante, p. 64.]

A principal is liable, not only in contract, but also in tort, for the fraud of his agent, when the act in respect of which the fraud is committed is within the scope of the agent's authority (whether to do a single act, or acts of a certain class), and when the act is done for the principal's benefit : also, when the act in respect of which the fraud is committed is outside the scope of the agent's authority, if the principal has derived a benefit from the fraud, but only to the extent of the benefit received. General rule of liability.

Now the wilful act which we have already considered under the first division of this section, was clearly a malicious act ; and the principle laid down by Blackburn, J., in *Limpus v. General Omnibus Co.*, was that the master is liable for the wilful acts of his servant, provided they are within the scope This is practically the same [ante, p. 56.] as in other actions for malicious acts of servants.

of his employment, and to further his master's interest; and this is precisely the same as the first part of the above proposition relating to fraud. The second part of that proposition is peculiarly applicable to torts from which a benefit can be derived, such as fraud. If a case could be found of a malicious act of a servant from which the master had derived a benefit, it would seem that this second part of the principle would also apply; that is to say, that the master would have to refund the benefit received.

General rule
as to wilful
acts.

On the whole, therefore, it seems accurate to say generally, that a master is not liable for the malicious or fraudulent acts of his servant, except when they are within the scope of his employment and for his benefit, or when he has in fact benefited from them, and then only to the extent of the benefit. The vague term "wilful act" is thus got rid of.

Servant must
commit a tort
in order to
render master
liable.

But in order to make a master liable for the fraud or any other tort of his servant, it is clear that there must have been fraud or some other tortious act on the part of the servant. If the servant is guilty of no tortious act, then the master is liable for none, *quoad* the act of his servant. Thus, if a false statement has been made by a servant, not knowing it to be false but believing it to be true, the servant has been guilty of no fraud, and consequently no liability attaches to the master. The law has, however, been carried farther, and it has been held that the principal's knowledge of facts which ought to be disclosed in answer to a question by an intending purchaser, will not make the withholding of them by an agent in ignorance of the truth such a fraud as to make either master or servant liable: *Cornfoote v. Fowke*.

6 M. & W.
373-

But master
may commit
an independ-
ent tort
through the
medium of
the servant.

This case has been very much questioned. All the judges were, however, careful to say that if a person, conscious of the true state of facts, were to employ agents who might unconsciously make false statements, with the express motive of getting such statements made, that would be a fraud on his part irrespective of any fraud of his agent. And such a

case actually arose in *Ludgater v. Love*, where a man, knowing his sheep had the rot, sent his son to market to sell them, fraudulently withholding from him the fact that they were diseased. The son represented them to be sound, and the father was held liable for his own fraud. (See also Lord St. Leonards' judgment in *The National Exchange Co. v. Drew*.)

44 L. T. 694.

2 Macq. H. L.
at p. 145.

(iv.) *Liability by Ratification.*

The liability of the principal for his agent's acts, so far as we have gone at present, has been seen to depend on two things: he is liable for acts done within the scope of the agent's or servant's employment or authority; he is also liable when he has derived benefit from the act, at least to the extent of the benefit. He may also become liable in a third way, by ratification.

In considering this subject, it is important not to lose sight of the fundamental principle that the principal and his agent, the master and his servant are joint tortfeasors.

The rule as to the extent to which an act may be ratified is thus stated by Lord Coke—4 Inst. 317: "He that receiveth a trespasser and agreeth to a trespass after it be done, is no trespasser unless the trespass was done to his use or for his benefit; and then his agreement subsequent amounteth to a commandment: for in that case *omnis ratihabitio retrotrahitur et mandato æquiparatur*." This sentence explains the whole law upon the subject. *Wilson v. Barker* affords a simple illustration. It was there laid down that a person knowingly receiving a chattel from one who has wrongfully seized who afterwards refuses to give it back, does not become a joint trespasser unless it was seized to his use. Another tort may have been committed, but the distinction is drawn between this tort and the one committed by the person who actually seized.

Rule as to
ratification.

4 B. & Ad:
614.

An early case from the year-book 7 H. IV., p. 34, pl. 1, is

given in the note in 6 M. & G. p. 239, which if carefully read is the best illustration to be found of this rule:—

An inquest was charged between two parties on a writ of trespass of certain cattle taken against the peace, in which the defendant had justified as bailiff for services arrear to his lord; whereas the plaintiff said that he was not bailiff of his lord at the time of the taking. And the plaintiff said in evidence, that the defendant took the beasts claiming heriot for himself, so that he could not at that time be bailiff to another. And *after their charge*, Gascoigne, C.J., said to them, that if the defendant took them claiming property in himself by way of heriot, although the lord afterwards agreed to that taking for the services due to him, still he could not be said to be his bailiff for that time. But if, without command, he had taken the cattle for services due to the lord, and the lord had afterwards agreed to the taking, he should be adjudged as bailiff, although he was not his bailiff in any place before the taking.—*Quod nota* (1).

The two questions which arise out of the rule are, first, Did the actual tortfeasor act on behalf of the person alleged to be his principal? Secondly, has this person actually ratified the tort, either by deed or by word?

(a). Act must have been done on behalf of the person ratifying.
6 M. & G. 242.

The first point has frequently been discussed in cases where a sheriff has wrongfully seized goods in execution. This was the case in *Wilson v. Tumman*, where the law was again laid down “that an act done *for another* by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. In such a case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority.” But the rule was held not to apply to the case, because the sheriff’s officers, who were the original trespassers by taking the goods of the plaintiffs, were not the servants

(1) The distinction taken afterwards between a person acting as *bailiff* and a person acting as *servant*, a precedent authority being said to be necessary for the latter though not for the former, does not affect the principle on which the decision was based.

or agents of the defendant, the judgment creditor, but the agents of a public officer or minister, obeying the mandate of a Court of Justice. They did not assume to act at the time as agents of the judgment creditor, but they acted as the servants of another, namely, the sheriff, by virtue of the process directed to him by the Court (1).

Secondly, the ratification must be express and intentional, and with full knowledge of the tortious nature of the act; it is not a matter of inference from subsequent conduct.

(b). Ratification must be express and intentional.

In *Roe v. Birkenhead Ry. Co.*, a similar case to those which we have already considered, where a railway servant committed an act not only which he was not authorized to commit, but as to which an authority could not be implied, because the company itself could not have committed the act; it is clear that the act was done on behalf of the company, and that they could have ratified it had they been so inclined: but it was held that a ratification could not be inferred from expressions of regret conveyed to the person injured, and promises to enquire into the circumstances of the occurrence.

7 Ex: 36.

[ante, p. 59.]

So, also, the intendment can only be made when the party supposed to have ratified is in a situation to have originally commanded it. Thus in *Nicoll v. Glennie*, the plaintiff had sent goods to a broker which he pledged, on account of advances made by them, to a firm who became bankrupt; the bankrupts afterwards pledged them again. These were both tortious conversions, but prior to the assignee's appointment. The assignees then committed another tort by refusing to deliver up the goods, but the bankrupts did not intermeddle with this. There was, therefore, no joint conversion by the bankrupts and the assignees: and it was held, also, that it was impossible for the assignees to have ratified the former

Person ratifying must be capable of
1 M. & S.
592.
having given the original command.

(1) Where, however, the judgment creditor has intermeddled either by accompanying the sheriff's officer or by giving a bond, the creditor himself will be a trespasser, and trover may be maintained against him though he has never received either the goods or their value from the sheriff: *Menham v. Edmonson*. This, however, is a case of simple agency and not of ratification.

1 B. & P. 369.

conversions because they had not come into existence when they occurred.

[on page 48.]

Further
definition of
joint tort-
feasors.

From what has been said in this section, it follows that to the definition already given of joint tortfeasors must therefore be added, those who are said constructively to do the act through the medium of another person, those who derive benefit from the act, although it is done by another person, and those who adopt the act done by another person when it is done on their behalf. In the second case, the adoption of the benefit imports a ratification. In the third, the imaginary presence created by the words "on behalf," is turned into a real presence by the subsequent approval of the act, and admission that it was in fact on his behalf.

§ 6. LIABILITY OF THE AGENT OR SERVANT.

[ante, pp: 47 et
seq.]

Agent may be
sued as a joint
tortfeasor.

The master and his servant, the principal and his agent, are both in the eye of the law joint tortfeasors; therefore, in accordance with the rules already considered, the agent himself may be sued for his tort, and he cannot screen himself behind his authorization; or, the agent and the principal may be sued together; or, the principal may be sued alone: but a judgment against either, even without satisfaction, will be a discharge of the other, and neither will have a remedy over against the other for indemnity or contribution. Whatever right of action one may have against the other must depend upon the contract between them.

6 Q. B. 443.
4 M. & S. 259.

The cases of *Davies v. Vernon*, and *Stephens v. Elwall*, are simple instances of a servant or agent being charged in trover, although the act of conversion was done by him for the benefit of his master or principal.

There are several cases, which may be referred to with advantage, of solicitors retaining deeds wrongfully or exacting money for their release on behalf of their clients, and being

held liable in consequence: *Smith v. Sleaf*; *Wakefield v. Newton*; *Close v. Phipps*. 12 M. & W. 585.
6 Q. B. 276.
7 M. & G. 586.

Since both principal and agent, or either, are liable as joint tortfeasors, their relation being ignored from the point of view of their liability, it follows that where money has been wrongfully obtained by the agent for his principal, it will be no defence for the agent in an action against him to say that he has paid over the money to his principal. Thus in *Sharland v. Mildon*, a widow intending to obtain representation to her deceased husband, began to collect the assets before she had actually obtained it, employing an agent for the purpose. She did not become the legal representative. It was clear that she could be sued as executrix de son tort. But the action was brought against her agent, and although he had paid the money over to her, it was held to be maintainable. See also *Townson v. Wilson*. Where money tortiously received by agent for principal, it is no defence that he has paid it over. 5 Hare 469.

The only exception to this rule would appear to be where the money has been *expressly* paid to the agent to be paid over to his principal: *Oates v. Hudson*; *Steel v. Williams*; *Snowdon v. Davis*. 1 Camp: 39. Exception. 6 Ex: 346.
8 Ex: 625.
1 Taunt: 359.

There is, however, a general exception to the rule as to the agent's liability: that is, where he is what is generally termed a ministerial servant. His trespass is then justified by the order under which he acted and which he was bound to obey, whether that order was right or wrong. The cases of bailiffs or other officers executing the process of a Court of Justice are simple examples of this exception: *Dews v. Riley*; *Andrews v. Marris*; subject to the rules given on page 300. Non-liability of ministerial servant, 11 C. B. 434.
1 Q. B. 3.

In *Mill v. Hawker*, the members of a highway board having resolved that a certain path was a highway, directed the plaintiff, who was the occupier of the land through which the path ran, to remove a lock off the gate at the entrance; the direction not being obeyed, the surveyor was ordered to remove it, which he did. The action was brought against the surveyor. Under sect. 16 of the Highways Act (25 & 26 Vict. c. 61), the surveyor is bound to execute the orders of the L. R. 10 Ex: 92.

because he is
bound to obey
his orders.

7 M. & W.
462.

Agent must
commit tort.

[*ante*, p. 71.]

29 L. J: Ex:
224.

Not liable
where he is a

board. If this order had been within the statutory powers of the board, the analogy between the case and that of ministerial officers would have been admitted, and judgment would have been for the surveyor; "for," said Blackburn, J., "if the statute said to a man, 'you are to obey the orders of a particular person,' it would be very hard to punish him if he did not obey those orders, and at the same time to make him liable if he did obey them." But the order was in excess of the powers of the board: "The Act does not say that when the board think that they have an authority, but have not that authority, that the surveyor is to act upon their directions, and, consequently, that while acting on their directions he is to be protected." The surveyor was held not to be protected by the Act, and therefore liable. See also *Thompson v. Gibson*, where the builders of a house for a corporation were held responsible not only for the nuisance of building, but also for the continuing nuisance of allowing it to remain, the house being an infringement of the plaintiff's rights of market.

It is important, however, to remember that the act of the agent must itself be a tort for any liability to attach to him. Thus the agent in *Ludgater v. Love* was clearly not liable. On this principle if the agent is a mere machine for carrying out his principal's tort (a ministerial agent for example), or if he has been merely instrumental in bringing about the relation of principal and agent between his principal and another person, then he is not liable.

Illustrations of this were given by Baron Bramwell in his judgment in *Bennett v. Bayes*. The landlord's agents had issued a warrant of distress to a broker for rent due from the plaintiff. Before the distress was put in, the rent was tendered, and the subsequent distraint became illegal. An action was brought against the agents. The learned judge said that it was doubtful whether the defendants (the agents) could be liable for the act which had been done by a servant whom he had procured for the principal of both of them;

“whether they were anything more than mere conduit-pipes for communicating authority from the landladies to Harrison (the bailiff). If the matter had rested there, I should have continued to entertain great doubt indeed whether they would have been liable. It seems certain that a mere messenger who delivers a letter, not knowing what is in it, is not responsible for the order that it contains; and I cannot help thinking that, if a servant was sent with a message to a broker and said, ‘My master desires you to distrain for the rent due to him,’ he would not be the person committing or ordering the trespass. Again, it would be an outrageous thing to say, that if a person wrote a letter and said, ‘Sir, my friend, Mr. B., is unable to write, and requests me to write and tell you to distrain on his tenant,’ that the writing of that letter would make him liable. It is impossible he could be liable in such a case.” In the case, however, the defendants were held to be more than mere conduit-pipes, and had not merely conveyed the order, but, as in *Bates v. Pilling*, had themselves 4 B. & C. 38. given it, and that they were therefore tortfeasors.

On the same principle, it was held in *Stone v. Cartwright* 6 T. R. 411. that an action would not lie against a manager or steward for damage done by those employed by him in the service of his principal, but that the action must be brought against the principal or those actually employed. The steward of course not standing in the position of a contractor.

In *Greenway v. Fisher*, it was held that this rule applied 1 C. & P. 190. to persons employed by others in the course of their own business: thus a packer who had, in the exercise of his business, shipped goods under the orders of a person who employed him for that purpose, was held not guilty of a conversion although the goods belonged to a third person. Abbott, C.J., said: “He was acting in the ordinary course of his business, and I am of opinion that the course of trade in this instance furnishes an exception to the general rule. The distinction between this case and that of a servant is that here there is a public employment: and as to a carrier, if, while he has

conduit-pipe
for the com-
mission of
master's tort.

Person em-
ployed in the
course of his
trade not a
servant, and
is not liable
for the tort.

the goods, there be a demand and refusal, trover will lie : but while he is a mere conduit-pipe in the ordinary course of trade, I think he is not liable."

§ 7. CONTRACTORS (1).

We now come to the important question of the liability of a person who has executed work from which damage has resulted, through the medium of an independent contractor.

(i.) *Compulsory Contracts.*

Where the contract is compulsory, person for whom work is done not liable.

Where the contract is compulsory, that is to say, where a person desiring to do a certain act can only do it by employing some one else, the relation of master and servant is considered not to exist, and the person for whom the work is done is not liable for the tortious acts of the contractor or his servants.

1 W. Rob:
Adm: 95.

For example, where a ship in entering a harbour is compelled by statute to take on board a pilot, to whom the navigation of the vessel is entrusted, the liability of the owner for the pilot's negligence is taken away ; but in the case of the *Maria* it was expressly held that he would not be liable even if the Act did not contain this provision.

12 A. & E. 737.

The liability being thus cast on the person employed, he becomes liable for the acts of his servants. As in *Milligan v. Wedge*, where a butcher who had bought a bullock in Smithfield market having to drive it through the city, was compelled to employ a licensed drover. Through the negligence of the drover's boy, the bullock injured the plaintiff. It was held that the drover was liable and not the butcher.

Relation of master and servant does not exist,

The principal ground on which these decisions rest is the fact that the relation of master and servant is at once excluded by the form which the contract of hiring takes. What

(1) The word "contractor" is used in this section in a commercial sense, that is, of a person whose business it is to enter into contracts ; and not in a legal sense, as of either party to a contract.

the owner of the property would do himself has been compulsorily given over to some one else, whose special business it is to do the acts in question. Considerable emphasis was laid in the last case on the distinct calling which the person employed executed, and this consideration may possibly prove of some value in other cases, for it is most important to observe the distinction between this compulsory hiring and the ordinary hiring which does not exclude the relation of master and servant. In this latter case, the liability of the person for whom the work is done is not taken away simply because the work is paid for by contract instead of by the piece or by the day.

but principal's liability not taken away, because work is paid for by contract.

In *Sadler v. Henlock*, the defendant employed a workman to clean out a drain; he was not in his service generally, but he was an ordinary labourer, and only specially in the defendant's service for the purpose of the work to be done. The highway was taken up and replaced improperly, so that the plaintiff's horse fell and was injured. It was held that the relation of master and servant existed, and that the man was not an independent contractor, and that consequently the master was liable. The test applied was, Did the defendant retain the power of controlling the work?

Test: power of controlling work.

This test will be found to distinguish satisfactorily these two classes of cases. In *Milligan v. Wedge* there was no such power, nor is there in the case of a compulsory pilot.

[ante, p. 78.]

There is, however, another test: Was there a power of choice in obtaining the services of the contractor? This may possibly furnish the distinction between *Milligan v. Wedge* and a very similar case, *Martin v. Temperley*. There, a barge-owner, in navigating a certain part of the river, was compelled to take on board a licensed waterman. An injury resulted from this waterman's negligence. It was held that the barge-owner was nevertheless liable, the relation of master and servant being assumed to exist partly from the use of the word "servant" in the Act. There seems, however, to have been a right to select any licensed waterman,

Test: power of choosing contractor.

4 Q. B. 298.

and not the first who offered ; and it was said that the fact that the choice was limited could not differentiate the case from the ordinary master and servant cases. Possibly, in the pilot and drover cases, there may have been no choice at all, the custom being in many cases to take on board the first pilot presenting himself. Unless this test is sound, the waterman case would seem not to be good law.

(ii.) *Voluntary contracts for services to be rendered by third parties ; or, liability for torts of other people's servants.*

5 B. & C. 547.
6 M. & W.
499.

General rule,
no liability for
acts of con-
tractor's ser-
vants.

We next come to cases where the contract is voluntary, and of these the best examples are furnished by the well-known carriage cases, *Laugher v. Pointer* and *Quáрман v. Burnett*.

In *Laugher v. Pointer*, the owner of a carriage hired from a jobmaster horses and driver, and an injury arose from the driver's negligence. The whole subject was thoroughly thrashed out in a long judgment of Littledale, J., in which the main inquiry was directed to ascertain whether the relation of master and servant existed between the owner of the carriage and the driver. "The master," said the learned judge, "is answerable for the servant's acts, because such servants represent the master himself, and their acts stand on the same footing as his own ; the reason is that domestic servants are hired either by the master personally, or by those who are entrusted by the master with the hiring of servants ; and this extends to servants whom the master or owner selects and appoints to do any work or superintend any business, although they are not in the immediate employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew ; if any accident happen through their default in management it is the same as if it happened through the immediate default of the owner himself. The payment being out of the

funds of the master, and they being the immediate servants of the owner." It was clear in the case that the power to dismiss did not rest with the hirer but with the jobmaster, and that the jobmaster paid the driver's wages, or allowed him to take gratuities in lieu of wages; in fact, that the relation of master and servant existed between them, even during the time he was driving the carriage. The question, therefore, was whether he was also the servant of the owner of the carriage during the drive. It was held that he must be the servant of one or the other, but that he could not be the servant of both at the same time. "The allowing two principals to be severally liable would tend to a multiplicity of actions, because if the traveller was liable, he might have an action against the stable-keeper for supplying improper drivers and horses, and then the stable-keeper might have an action against his own drivers. If, indeed, several persons are concerned in a trespass or other tortious act, they are liable jointly or severally at the election of the party injured; but the several liability arises from the joint liability, and from the rule of law that a party injured need not sue all who are guilty of the wrongful act. But two persons cannot be made separately liable at the election of the party suing unless in cases where they would be jointly liable; and there cannot be any ground for saying that the hirer of the horses and the jobman would be jointly liable."

Servant, for the purposes of liability, cannot have two masters.

The inquiry must therefore always be, who is the master of the tortfeasor, and the test of service to be deduced from this case is therefore payment of wages and power to dismiss.

Test: payment of wages and power to dismiss.

In *Quarman v. Burnett*, the case against the owner of the carriage was somewhat stronger; the driver wore a livery, provided by the owner, which was always hung up in the hall on the return from a drive; the accident happened whilst he had left his horses for the purpose of hanging up the coat. The immediate cause was the personal neglect of the coachman; and again the question was discussed, Who was his master at the time of the accident? The answer was given,

6 M. & W. 499.

Test: selection
of servant:
control and
power to
dismiss.

"He who had selected him as his servant, from the knowledge or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint such servants for him, can make no difference." To make the hirer liable recourse would be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person in carrying into execution that which that other person had contracted to do for his benefit; a position which the Court held to be too large.

The tests from this case are, power to dismiss, power to compel obedience, and selection.

The important
test is
power of
selection.

This last, the power of selection, seems to be the important consideration. All the other tests which have been given flow more or less directly from that power; and, as we shall see, when they exist independently of the choice of the servant, the liability follows the choice, and not the power to dismiss or to compel obedience, or even the payment of wages. The question we are considering is the liability of one for the acts of another. Up to the present time nothing but the relation of master and servant or principal and agent has been found to create this liability; this relation cannot exist without deliberate choice, and this choice it must be presumed to have been based on "the knowledge and belief in his skill and care," and his capacity to do his master's work. Being put forward to do his master's work he represents his master, and his master's liability for his negligence in performing his work flows immediately from this representation of his master.

Choice may
be delegated
to others.

Where the master delegates this power of selection to another, over whom he is also master, it is obvious that both are servants to one master; but where a person contracts with another to whom he does not stand in the position of master, and that other employs a servant to do the work contracted

for, it is obvious that, as the relation of master and servant does not exist between the principals to the contract, it cannot exist between one of those principals and third parties introduced by the other.

Some little difficulty arises, however, from this question of selection; in *Quarman v. Burnett*, the case was put of the hirer selecting from among the contractor's servants one particular coachman. The Court intimated an opinion that even in this case the hirer would not be liable; and this, apparently, is good law, because it does not alter the fact that the jobmaster originally selected the man, and was willing to be represented in the performance of the work by any of his servants.

[*ante*, p. 81.]

Hirer may choose from among contractor's servants, and not be liable.

Under certain circumstances, however, the liability for the negligent act may be shifted from the contractor to the hirer. As, for instance, where his actual control over the driver has been the cause of the injury. In *McLaughlin v. Prior*, a hired carriage was being driven by postilions, servants of the jobmaster. The hirer rode on the box; and on his responsibility the postilions drove in such a manner as to upset another carriage. He was held liable, because at the time of the accident he had assumed the mastership of the jobmaster's servants, or at least had participated in the tort so as to become a joint tortfeasor. His liability would presumably exclude the contractor's. On the same principle it was said in *Overton v. Freeman*, where parish officers had contracted with A. for work, and A. made a sub-contract with B. to do the paving, A. supplying the materials, that A. might have been liable for an accident arising from the negligence of B.'s workmen, if he had in any manner directed or countenanced the act.

Liability shifted to hirer when he assumes control and directs certain acts.

4 M. & G. 48.

He becomes joint tortfeasor.

11 C. B. 873.

The consequence of this temporary change of mastership is well illustrated by *Murray v. Currie*, in which there was a loan of a workman. The defendant employed a stevedore to unload a vessel. The stevedore employed and paid his own workmen, amongst whom was the plaintiff and one of

L. R. 6 C. P. 24.

Examples of inquiry who is real master.

the defendant's sailors. The plaintiff was injured by this sailor. In determining the question whether they were fellow-servants or not, it was of course necessary to inquire strictly who was the person to whom the maxim *respondet superior* should apply. The accident occurring during the unloading, it was held that the sailor was at that time the servant of the stevedore. The same point was discussed in *Rourke v. White Moss Colliery Co.*, and a distinction was drawn between the loan of a servant, in which case the borrower would be liable, and an agreement by the person for whom the work is contracted to be done, to do part of the work himself or by his own servants, in which case he and not the contractor would be liable for the negligence of these servants.

Where property is demised, new owner adopts predecessor's choice.

3 C. P. D. 121.

Another test of liability similar to the above is derived from the ownership of the property; if there has been an actual demise, the liability of the person who has originally chosen the servants ceases, because with the demise the control over the servants is lost, and the new proprietor adopts the choice of the previous owner: *Steel v. Lester*.

(iii.) *Consideration of liability of Landlord and Tenant.*

This question of demise brings us to the very important subject of the liability of landlord or tenant for injuries resulting from the premises themselves.

4 Taunt : 648.

Case of negligence of landlord's workmen.

In *Leslie v. Pounds*, where the injuries arose from the negligence of workmen employed in doing some repairs, the question was determined in accordance with the foregoing principles. Under the lease the landlord was to judge of what repairs should be done, and was to direct the execution of them, and the tenant was to pay for them. The workmen negligently left the entrance to the cellar, in the public footway, uncovered during the night, and the plaintiff fell into it and was injured. The only question, therefore, was whose servants the workmen were, and the Court held they were the landlord's, and that he was liable.

But where the accident has not arisen from any negligence of workmen, but from defects in the building itself, the general rule is thus stated in Woodfall's Landlord and Tenant [ch. xix. s. 1]: "As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition."

Accident from defective building.

The person who is in possession of premises, and who allows them to be in a dangerous condition, is the person *primâ facie* responsible to the public for any injury resulting from their being out of repair (Bovill, C.J., *Pretty v. Bickmore*). Under certain circumstances, however, the landlord may be liable; and the rule as to this liability may be stated shortly as follows: "When the property of the landlord is let by him in a state which is a nuisance, and he is himself responsible for its being in such a state, he is liable. If the landlord remains liable for repairs to the demised premises, that is evidence of his continuing the nuisance; the fact, on the other hand, of the tenant being bound to repair being almost conclusive evidence that the landlord is not liable." [Woodfall, c. xix. s. 1.]

Person in possession *primâ facie* liable.

L. R. 8 C. P. 401.

Landlord liable for continuing a nuisance:

In *Nelson v. Liverpool Brewery Co.*, Lopes, J., said, "We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier and the occupier alone being *primâ facie* liable; first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition."

2 C. P. D. 311.

where he covenants to repair; where he demises ruinous premises.

In *Pretty v. Bickmore*, the defendant let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate which was at the time of the demise out of repair and dangerous. A

passer-by in consequence fell into the aperture and was injured. He brought an action against the landlord and was non-suited, and the Court of Common Pleas held rightly. Keating, J., thus stated the law: "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorized the continuance of this coal-shoot in an insecure state; for instance, that he retained the obligation to repair the premises: that might be a circumstance to show that he authorized the continuance of the nuisance." There was a covenant to repair by the tenant, but it was not noticed in the judgments, the inquiry being simply, could the landlord be made liable. But, in *Gwinnell v. Eames*, under an exactly similar state of facts, emphasis was laid on the tenant's covenant to repair, which seems to show that in the case of misfeasance by the landlord the liability is shifted if there is a covenant by the tenant (1).

L. R. 10 C. P.
658.

L. R. 8 C. P.
401.

General rule.

It is very instructive to notice how the same result is arrived at in these two cases by the application of two different propositions. In *Pretty v. Bickmore* the principle laid down is that the occupier is liable unless the landlord has covenanted to repair; in *Gwinnell v. Eames*, that if the landlord has let ruinous premises (which he had done in both cases), he is liable unless the tenant has covenanted to repair. The rule to be derived from both these principles combined is this: that the occupier is liable unless the landlord has covenanted to repair, or unless at the time of the demise the premises (or the particular part of them) were in a ruinous condition, in which last case the liability of the occupier revives if he himself is under covenant to repair. But it is a mistake to say that the liability therefore follows the covenant; for where there is no covenant at all, the occupier is liable unless the premises were ruinous at the time of the demise, in which case the owner is liable.

(1) The question of the knowledge of the landlord of the defect, which was also discussed, is of course only the question whether if he is liable he has any defence.

With regard to the liability of the tenant, it is always said that he is *primâ facie* liable, and that he may *shift* his liability on to the landlord. There seems, however, some question whether they are not joint tortfeasors, although Brett, J., in *Gwinnett v. Eames* considered that if the burthen of repair is cast upon the tenant, the duty of the landlord altogether ceases (1).

Examination
of alternative
liability.

L. R. 10 C. P.
658.

It must be confessed, however, that it is difficult to explain the alternative liability on which all the cases dwell; why the covenant to repair as between two parties should affect the liability of either towards the public. It is clear that in a case in which the occupier is liable he could not get rid of that liability by alleging that he had contracted with another person to execute the necessary repairs, and that as he had not executed them he and not the occupier was liable; why, then, should he get rid of his liability by setting up this covenant with the landlord which is unfulfilled? Notwithstanding Brett, J.'s strong expression of opinion, the point has not directly been decided, and it is with great submission suggested that the reason which is given above for the landlord's liability, where he has covenanted, is the true one, and points to him as a joint tortfeasor; and the same principle would apply to a tenant who had covenanted to repair, where the demised premises were ruinous when he entered into occupation. It would seem, too, that an actual demise is necessary, and that an occupier, to whom premises were only lent for a time, would not under any circumstances be liable.

In *Todd v. Flight*, in which the accident arose from the falling of a stack of chimneys, the fact according to the declaration (which was necessarily assumed to be true on demurrer) was that the landlord had kept and maintained the stack in a ruinous state and in danger of falling; "and thus,"

9 C. B. : N. S.
377.

(1) In *Rosewell v. Prior*, the owner let the premises with the nuisance complained of, which had been erected upon them. That, therefore, was a misfeasance of which he himself had been guilty; and, say the Court, his demise affirmed the continuance of the nuisance, and therefore might be said to be a continuation of it by himself. *Per* Buller, J., in *Cheetham v. Hampson*.

Salk : 460.

4 T. R. 318.

said Erle, C.J., "he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no fault of the lessee, but by the laws of nature." Here, again, stress is laid on the absence of the lessee's fault, and the liability to the public is apparently made to depend on the existence of a private right between two persons; if this were so, and there were no covenant to repair on either side, no one would be liable. It is suggested, however, that the true view of the law is that stated above, and that the only reason for introducing the covenant to repair is to ascertain whether the landlord is or is not liable for a continuing nuisance.

On similar principles, if the landlord builds a chimney which, by the act of the tenant, becomes a nuisance, the landlord is not liable: *Rich v. Basterfield*; but if this use is contemplated and authorized by the landlord, he is, as well as the tenant, the author of the continuance of the nuisance: *Harris v. James*.

(iv.) *Sub-contractors.*

The same
rules apply to
sub-contractors.

[*Ant.*, p. 96.]

28 L. J. Q. B.
52.

The rule as to contractors is extended to sub-contractors, the inquiry being the same as before, whether the relation of master and servant exists between the original contractor and the sub-contractor; if it does not, then the contractor is not liable but the sub-contractor for his own or for his servant's torts. *Rapson v. Cubitt* is an example of this. In *Dalzell v. Tyrer*, the plaintiff contracted with H. to be carried across the ferry; H. hired the vessel and crew from the defendant; the accident happened through the negligence of the crew. They being selected and hired by the defendant, and remaining under his control, H. was held liable. The contract between H. and the plaintiff was held to make no difference; for it was clear that the action could have been brought against the defendant by a stranger who had been damaged by the crew, and the mere existence of the contract could not take the right of action away from the plaintiff.

(ii.) continued. *Voluntary contracts for services to be rendered by third parties.*

We must now revert to the second division of the subject, namely, the liability for the acts of contractor's servants. Second division of the subject completed.

Another illustration of the strictness of the inquiry whether the relation of master and servant actually exists between the actual tortfeasor and the person for whom the work is done is to be found in the extension of the rule as to contractors, to cases where the person undertaking the work is at the time of the contract the servant of the other party to it. Thus, in *Knight v. Fox*, a company contracted with A. to make a railway; A. contracted with B. to make a bridge over it, and B. contracted with C., who was his general servant, surveyor and manager at an annual salary, to erect the scaffolding. The injury arose from a defect in the scaffold, and C. was held alone liable on the ground that he was not *quoad* that particular work B.'s servant. Case of contract undertaken by general servant.
5 Ex: 725.

This point is not without difficulty. In *Blake v. Thirst* a fall into a sewer was being constructed under contract between the defendant and the commissioners. The defendant contracted with one of his workmen to do the brick-work and watching. It was proved that the defendant had a right to control the way in which the work was to be executed, and that he would have dismissed the workman if he had been dissatisfied with the work. He was held liable, because the facts shewed that the relation of master and servant remained notwithstanding the contract. 2 H. & C. 20.

But some little difficulty arises in determining what amount of control of workmen or superintendence of work will shift the liability for negligence from the actual master to the person who has contracted with him for his servant's work. What amount of control will shift liability.

From *Quarman v. Burnett*, and similar cases, it will be seen that the ordinary control which the hirer must have over [ante, p. 81.]

the hired servant of the contractor is not sufficient to make the hirer liable. The most recent case on this point is *Jones v. Corporation of Liverpool*. It remains to be seen if the retention of any larger control will make him liable.

14 Q. B. D.
890.

In *Steel v. South Eastern Ry. Co.* the company was held not liable, although their surveyor was superintending the works and directing their progress. In *Reedie v. North Western Ry. Co.* a bridge was being made by contract over a highway, and one of the workmen let a stone fall on a passer-by: the company was held not liable, although they had reserved to themselves power to dismiss men for incompetence. The decision was rested on the principle that he who had chosen the workmen must be liable.

16 C. B. 550.

4 Ex: 255.

Power to dis-
miss insuffi-
cient test.

So where a charterer hired a steamer for six months, the owners to keep her in good order and to find seamen, whose wages the charterer would pay, the owners were held liable for the seamen's negligence: *Fenton v. City of Dublin Steam Co.*

8 A. & E.
835.

The same point arose in *Pendlebury v. Greenhalgh*. A certain portion of a highway was ordered to be raised under the superintendence of the surveyor of highways. The surveyor contracted with another person to do the work, but he himself "had nothing to do with the paving, except superintending on behalf of the vestry committee." The accident arose at night from the alteration in the road levels not being properly marked out with lights. The Court of Appeal held the surveyor liable. Lord Cairns, C., pointed out that "the work ordered to be done was of a complex nature, consisting of providing materials, labour, superintendence, and, as incident to the work, lighting and fencing during the night. It was therefore necessary to see what had been contracted for: it was for the labour alone. Therefore, if the defendant did not contract for the fencing or lighting, then the duty of fencing and lighting remained in the defendant, for which he remained responsible."

1 Q. B. D.
36.

It must be particularly noticed that the question we have been considering is the exemption from liability of a person who has done work by the agency of an independent contractor with servants and workmen of his own, for the acts of negligence of those servants. It follows, therefore, that there can be no such exemption unless the tort has in fact been committed, or can be directly traced to these servants or to the person who is responsible for them. They have been employed to do something in a proper manner and they have done it in an improper manner.

No exemption from liability if the tort is traceable to the principal:

But the injury may be directly traceable, not to the manner in which the work has been executed, but to the work itself. The tortious act in such a case is his who ordered the work to be done. For example, if a person intending to dig a trench in the highway has the work done by contract, if the work is negligently done (as where heaps of stones are put in unnecessary and unusual places) the contractor is liable and not the person who gave the order; but if the work is not done negligently (as where heaps of stones are put in proper and usual places) and an accident happen which would not have happened but for the work in the highway, then the contractor is not the tortfeasor but the person for whom the work was done. Lord Campbell, C.J., emphasised the distinction in *Ellis v. Sheffield Gas Co.*: "If the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. If he is employed for a lawful act the relation of master and servant does not subsist between the employer and those actually doing the work. He is not answerable except for the act itself. This rule is usually expressed by saying that if a man authorizes lawful work, or work from which if properly done no evil consequences can arise, he is not liable for the negligence of the contractor's servants; but if the work is unlawful, or the injury is a natural consequence of the work even when properly executed, then he is liable." The liability of the servant in the latter case, however, still remains.

e.g., where the work itself is tortious.

2 E. & B. 767.

[cf. p. 74.]

Old distinction between work on movables and immovables examined.
[*ante*, p. 80.]

A very common application of this rule occurs in cases where repairs to a house have been executed, and damage to a neighbouring house or to a passer-by has been the result. And on this account a distinction was for some time supposed to exist between contracts for work to immovable property and contracts relating to immovables. This distinction was indeed said to exist by Littledale, J., in *Laugher v. Pointer*, but it has since been frequently pointed out to be erroneous. The decisions which have been based upon it are nevertheless not necessarily erroneous.

1 B. & P. 404.

6 T. R. 411.

2 H. Bl: 267,
299.

[*cf.*: Littledale, J., in *Laugher v. Pointer*, *ante*, p. 80.]

The distinction between such a case and *Laugher v. Pointer* seems to have been felt, and also that the owner ought to be responsible; but the true ground of liability was missed. *Bush v. Steinman* was the first case in which the principle took definite form, and although it has been repeatedly declared to be bad law, it will be instructive shortly to consider the facts of the case. A. had a house, and contracted with B. to repair it: B. contracted with C. to do the work: C. with D. to furnish the materials. D.'s servants placed the materials in the road and the plaintiff's carriage was upset. The Court held A. liable, but Eyre, C.J., confessed that he found some difficulty in stating accurately the grounds of liability. Of the earlier cases, *Stone v. Cartwright* and *Littledale v. Lonsdale* were quoted with approval as applicable to the case. The former certainly was not. The owner of a mine was there held answerable for the negligence of the persons employed by the steward. The facts of the latter case are not very clear from the report. It seems however that "Lord Lonsdale's colliery was worked in such a manner by his agents and servants that an injury was done to the plaintiff's house, and his lordship was held responsible." The Chief Justice added, however, "or possibly by the contractors, for that would have made no difference:" this answered the point in dispute in the case before the Court. Another case was put: "Suppose then that the owner of a house, with a view to rebuild or repair, employ his own servants

to erect a hord in the street (which being for the benefit of the public they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance, and I apprehend that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for in contemplation of law the erection of the hord would equally be his act." This bringing the argument a step nearer the case, the final step was taken, and the determination that A. was liable was arrived at, which was characterised as "certainly highly convenient, and beneficial to the public."

The liability of the owner in the hypothetical case put by Eyre, C.J., is undoubted, and it is in conformity with the decision in *Pickard v. Smith*. The defendant, having employed a coal merchant to put coals in his cellar, was held liable for injury suffered by the plaintiff from his falling through the cellar opening which had been left open by the negligence of the coal merchant's servants. Williams, J., said the ordinary rule of exemption is inapplicable to cases in which the act which occasions the injury is one which the contractor is employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." In *Gray v. Pullen* the latter part of the rule was applied. An Act of Parliament having authorised the cutting a trench across a highway for the purpose of making a drain, but having attached to the exercise of the right the condition of filling up the trench after the drain had been completed, the defendant employed a contractor to do the whole work; the re-filling was done negligently, and the plaintiff's wife sustained personal injury. The rule was laid down in the Exchequer Chamber that "where a work is being executed from which danger may arise to others, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures

10 C. B:
N. S. 470.

Where a duty has to be performed, liability for non-performance is not excused, because it has not been done by contractor who has been employed, nor by his servants.

5 B. & S. 970.

6 H. & N.
488.

to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor." (See also *Hole v. Sittingbourne Ry. Co.*)

General rule
as to liability
of principal
for acts of
contractor or
his servants.

There are therefore these two principles governing the liability of the person for whom work is done. He who orders the doing of an act which is of itself productive of injury is liable whether he has done it by his own servants or by a contractor or by a contractor's servants. He who has a duty to perform cannot shift the duty on to the shoulders of another, and is liable for its non-performance, although the fault may be directly attributable to another who has contracted to do it.

[*ante*, p. 92.]

It is obvious that nothing in this statement of the law has any special application to immovable property. Reverting for a moment to *Bush v. Steinman*; the placing the materials in an unguarded manner in the highway was not the work which was contracted to be done: nor was there any special duty laid on the owner of the house, any more than in any other case of work done by contract, to see that the contractor's servants worked without negligence, merely because the work was being done to immovable property. The defendant's liability can therefore be judged of according to the rules already laid down.

Three well-known recent illustrations of the general rule may be shortly referred to.

1 Q. B. D.
321.
Examples of
general rule.
Case of sup-
port of adjoin-
ing houses.

The plaintiff and defendant in *Bower v. Peate* were owners of two adjoining houses, the plaintiff being entitled to the support, for his house, of the defendant's soil. The defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house. The plaintiff's house was injured in the progress of the work, owing to the means taken by the contractor to support it being insufficient. The defendant was held liable, because he had ordered work to be executed from which, in the natural course of

things, injurious consequences to his neighbour must have been expected to arise unless means were adopted by which such consequences might have been prevented; he was therefore bound to see to the doing of that which was necessary to prevent the mischief, and could not relieve himself from responsibility by employing someone else to do what was necessary to prevent the act he had ordered from becoming wrongful.

In *Dalton v. Angus*, under almost identical circumstances, one of the defences was held bad on the same principle: the question of indemnity having been taken from the contractor was also considered. Lord Blackburn said that the person on whom the duty was cast might "bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

L. R. 6 H. L.
740.
Indemnity
from contrac-
tor no excuse:
it only gives a
right over
against him.

Again, in *Hughes v. Percival* the same principle was acted on—the question arising as to the use of party walls. Some doubt was thrown by Lord Blackburn on the principle laid down in *Bower v. Peate* given above, as to whether it was not too broad, and might possibly include in its application the carriage cases, and consequently conflict with *Quarman v. Burnett*. It seems, however, clear that running over people, or into other carriages, are not injurious consequences arising in the natural course of things from hiring a carriage.

8 App: Ca:
443.

On the same principle, if the owner of a house or land allows a noxious trade to be carried on in or upon it by one who is not a tenant, he will himself be liable, by virtue of the duty laid on all so to use their own property as not to injure the rights of others. (*Per Parke, B.: Reddie v. North Western Ry. Co.*)

[ante, p 81.]

4 Ex: at p.
256.

One further point must be noticed: it is really an application of the general rules, but is frequently stated in another form.

Liability for
contractor's
work after it
is finished.

After the work has been taken over from the contractor by the principal, he is supposed to have adopted the work with all its faults, and is liable for any injury that may result from the negligent workmanship.

1 Q. B. D.
314.

Thus in *Tarry v. Ashton* a lamp overhanging a highway was out of repair: as occupier of the house a duty was cast upon the defendant, from time to time, to investigate the state of the lamp. Being aware that it was out of repair he employed a contractor to do it: the jury found that he was not a servant but an independent contractor. The Court found, consequently, that the defendant having the duty, and having trusted the fulfilment of it to another who had not done it, was liable for the consequences of its falling on a passer-by. It must be confessed that it seems perfectly immaterial at what time the accident happened, whether during the work or after it was finished. In either case the defendant would have been liable, by reason of the duty left unperformed.

(v.) *Liability for the Torts of Contractors.*

Where the tort is the act of the contractor and not of his servants, it would seem that the principal is liable.

[*ante*, p. 78.]

[*ante*, p. 79.]

9 M. & W.
710.

We have confined the second section to contracts for services to be rendered by third parties, who are in effect the contractor's servants. There is room to doubt whether the same principles apply where the tort is the act of the contractor, or sub-contractor, himself: that is to say, whether the relation of master and servant, or principal and agent, does not exist independently of the existence of a special contract to do a certain work. Where the contract is compulsory, as we have seen, for special reasons, the relation is not assumed to exist; but *Sadler v. Henlock* is an authority in favour of the relation existing and consequent liability of the person for whom the work is done where the contract is not compulsory. In *Rapson v. Cubitt* the committee of a club contracted with A., a builder, to execute repairs to, among other things, some gas fittings; A. contracted with B., a gas-fitter, to do the gas

repairs; they were executed negligently, and an accident happened. It was held that B. was liable and not A.

In the judgments it seems to have been treated as immaterial whether the negligence was B.'s, or his workmen's. In the facts, however, there is this important statement: "In consequence of the omission of B., or some of his servants, to turn the gas off, a large quantity of it escaped and exploded." If the omission had been on the part of his servants, then the case is an illustration of the application of these rules to sub-contractors. It is suggested that this must be read into the case, and that the decision really leaves untouched the principle of *Sadler v. Henlock*. Where the work is done by a contractor himself, the chief features of the relation of master and servant exist, namely, the power of selection, the right to control, and the power to dismiss on a proper occasion; and it would seem therefore that the person for whom the work is done is liable for the tort of the contractor, though he is not liable for those of the contractor's servants.

[cf. p. 88.]

The case satisfies the ordinary tests of master and servant.

Tarry v. Ashton may also be explained on this ground.

[ante, p. 96.]

§ 8. LIABILITY FOR DAMAGE CAUSED BY ANIMALS.

In dealing with the liability of an owner for the injurious acts of his animals, it will be convenient to deal first with trespasses, and secondly with other injuries which spring from their viciousness.

(i.) *Trespasses by Animals.*

First, then, as to trespasses. The question only arises when the trespass is independent; for it seems perfectly clear, that if an animal accompanies any person (whether his master or a stranger), the damage done by the animal is consequential upon the trespass of the person he accompanies, and damages for it may be recovered in the action against that person. (See *Beckwith v. Shordike* (1).)

Owner liable for independent trespasses by animals.

4 Burr: 2093.

(1) Where the owner of lands adjoining a highway has neglected to fence them, although there is no obligation so to do, and cattle stray from the high-

Trespass due to neglect

only where
animal capa-
ble of becom-
ing property.

5 Co: 104a.
Case of the
coney.

But where the trespass is committed by the animal independently of his master (2), the rule is, that where the animal is one in which the law gives him what is called "a valuable property," the master is liable, but if it is one in which he had no such property, then he is not liable. Animals *mansuetæ naturæ*, cattle, sheep, poultry, and all domestic or domesticated animals come under the first class: those which are wild, *feræ naturæ*, come under the second. In *Boulston's case* it was ruled that an action would not lie against a man for making coney-boroughs on his own land, although the coney increased in so great number that they destroyed his neighbour's land next adjoining. And the reason given was, that so soon as the coney comes on the neighbour's land he might kill them; for they are *feræ naturæ*, and he who makes the coney-boroughs has no property in them (the coney), and he shall not be punished for the damage which the coney does in which he has no property, and which the other may lawfully kill.

This distinction of animals into those *mansuetæ* and those *feræ naturæ*, and the consequent rule of law that the first are the subject of property, and the second are not the subject of property, leads us to the consideration of some of the most extraordinary anomalies of our law.

Scienter is not
considered in
trespasses by
wild animals.

When we come to other injuries, such as biting, kicking, or goring, we shall find that the distinction has led to a very useful rule, making liability depend on the *scienter*, or knowledge of vice, according as the animal is tame or wild: but

fence high-
way.

28 L. J: Ex:
298.
2 H. Bl: 528.
10 Q. B. D.
17.

way into his fields and injure his crops, he cannot immediately distrain the cattle *damage feasant*, but must either attempt to drive them out himself or allow the drovers a reasonable time to return and get them off the land. It would seem also that no action would lie against the owner of the cattle for trespass if the drover returned with reasonable speed: *Goodwyn v. Cheveley*. But this rule only applies where the cattle are lawfully using the highway and are not straying thereon: *Dovaston v. Payne*. (See also the remarks on the bull in the china shop case: *Tillett v. Ward*, *post*, p. 213.)

(2) The animal will be considered to be trespassing independently of his master if he is accompanying a servant in the trespass, where the master cannot be held liable for the servant's trespass as being beyond the scope of his employment. In such a case of course the servant will be liable.

that rule, it will be seen, ignores the question of property, making possession the sole test. It is somewhat extraordinary that the mere possession and propagation of wild animals does not make the possessor of them liable for trespass, even if coupled with a knowledge of their roving disposition or mischievous propensities when loose.

[*cf.* the discussion on *Rylands v. Fletcher*, *post*, p. 111.]

And even when we accept this test of strict ownership with regard to trespasses, we are face to face with another anomaly, which arises from the difficulty of drawing a hard and fast line between wild and domestic animals.

The dog has given the lawyers considerable anxiety: he was not the subject of property at common law, and, like many other things, it was not the subject of larceny until it was so provided by the 24 & 25 Vict. c. 96. The old lawyers seem nevertheless to have been shocked at the argument that the dog was a wild animal, and had not yet completely shaken off the nature of its wolfish progenitors. The requirement of a *scienter* to make the owner liable for his dog's bite shews, that at least in one respect the animal is supposed to be tame.

Dogs.

Nevertheless it has been held on this ground of absence of property, that if a man's dog goes into his neighbour's garden and spoils and injures his crops, no action will lie: *Mason v. Keeling*; *Brown v. Jiles*; and these cases were approved in a very recent case, *Sanders v. Teape*, where a dog jumped over a wall and fell on to the plaintiff's neck, who was a workman on the neighbouring premises, and injured him.

No action for trespass by dogs;

12 Mod: 336.

1 C. & P. 118.

51 L. T. 263.

The Court held that the result of the cases was that "if a dog going about commits an injury or does any mischief, the owner of the dog will be liable only if the dog was of a mischievous nature, and he was aware of that fact." No distinction was taken between trespasses and other injuries committed by a dog: but it is certain that this distinction does exist with regard to other animals both *mansuetæ* and *feræ naturæ*. In this case, however, the question of trespass really

did not arise, for the labourer was a licensee, and could not have brought an action for trespass to the property against the owner of the dog.

17 C. B:
N. S. 245.
unless there is
scienter of the
particular mis-
chief done.

But in *Read v. Edwards*, the defendant's dog was allowed to be at large, and it entered the plaintiff's wood and destroyed his game. The jury found that the dog had a propensity for chasing and destroying game, going out of its own accord for that purpose, and that this propensity was known to the defendant. He was held liable on account of the *scienter* of the particular mischief which had occurred.

It would seem, however, that this rule does not cover damage done by trampling on crops.

Animals in
which there
may be a
valuable
property.
18 C. B: N. S.
722.
Trespass
followed by
other damage.
Examples of
enquiry as to
remoteness of
damage.

Where, however, the owner has an absolute property, as in a horse, then he is liable for the trespass and for all the consequential damages, subject to the rules as to remoteness.

In *Lee v. Riley*, through defect of fences, which it was the duty of the defendant to repair, his mare strayed in the night time from his close into an adjoining, and so into a field of the plaintiff's in which was a horse. From some unexplained cause the animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare which broke his leg, and he was necessarily killed. The defendant was held liable, and the damage too remote.

L. R. 10 C. P.
10.

In *Ellis v. Loftus Iron Co.*, the defendant's horse had injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendant's. It was held that the mere putting the horse's head over the plaintiff's land was a trespass, and, on the authority of the preceding case, the questions of liability and of remoteness of damage were answered in the plaintiff's favour.

13 C. B: N. S.
430.
Example of
enquiry as to
scienter.

In *Cox v. Burbidge*, the defendant's horse was straying on a highway. As against the owner of the soil it was trespassing; or if it were a public highway, its owner was amenable under the Highway Act. The plaintiff, a child of tender age, was lawfully upon the highway, and was kicked by the horse.

It was held that the defendant was not liable, on the ground "that the owner of an animal is only answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it." The Court considered that the horse had done "something which was quite contrary to his ordinary nature; something which the owner had no reason to expect he would do," for "everybody knows that it is not at all the ordinary habit of a horse to kick a child on the highway."

The present Mr. Justice Cave, in his edition of Addison on Torts, gives the principle to be deduced from the first two cases as follows: "Where an animal is a trespasser, the fact that an injury done by it there is due to the animal's vice is immaterial. The owner in such a case is liable for all the damage it may do, whether the damage is such as may reasonably be expected from the nature of the animal, or is due to the mischievous propensities of which the owner is ignorant." In a foot-note it is added that "these cases however are not easily reconciled with *Cox v. Burbidge*; as it is difficult to see on what principle the owner of a straying horse is liable if the horse kicks a man in the field, and not liable if he kicks him on a public road." The cases are indeed difficult to reconcile. The last proceeds on the absence of *scienter*, and may be for the present taken to be sound law. The first two depend on the principle of remoteness of damage, and to all appearance the two questions are different: but in point of fact they appear to the author to be entirely identical. The right to recover damages as tested by the principle of remoteness is, it is true, connected with the initial trespass to this extent, that the question cannot arise until the initial trespass has been proved (1): but once proved, it is entirely

The two enquiries are practically the same.

(1) Injuries which result to the plaintiff's cattle from the defendant's cattle getting through fences which were out of repair and which the plaintiff himself was bound to repair, give of course no right of action.

An example of this is to be found in *Child v. Hearn*, where some pigs got through a fence from land adjoining a railway, and upset a trolley on which some plate-layers were travelling. The duty to fence being laid by statute

No action where plaintiff should have repaired fence.
L. R. 9 Ex: 176.

independent of it, the right being governed by an entirely new set of principles. The governing principle of remoteness of damage in torts is this: Did the person charged contemplate, or could or ought he to have contemplated or foreseen, its occurrence? If he did not, if it is such that a reasonable man could not have foreseen it, then the damage is too remote.

Now in this instance this foresight cannot be tested by the answer to the question, "If my fence is broken or insufficient, will my horse injure my neighbour's mare?" but by the answer to this: "If my horse escapes through my fence, is it of such a vicious disposition that it will injure my neighbour's mare; or is it usual for horses to kick mares?" and this is precisely the question which is propounded to test the *scienter*. And yet in the two cases it is answered differently, and for no apparent reason (2).

(ii.) *Other Injuries by Animals.*

We now come to other injuries by animals, such as kicking, biting, or goring.

(a.) *By animals feræ naturæ.*

The monkey
case.
9 Q. B. 101.

The leading case on the subject is *May v. Burdett*. The action was for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The conclusion from the early cases was said to be that "whosoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is

[*cf.* p. 253.]

on the company, and the plate-layers being their servants and identified with them, it was held they could not recover against the owners of the pigs.

Difficult questions sometimes arise in these cases in determining whose is the duty to repair, but these lie outside our subject.

(2) That is no reason apparent on the face of the judgments. A reason may, however, easily be suggested from the fact of the injury being done by a horse to a mare; if this be the true distinction, then the inference drawn by the learned editor of Addison is not warranted. The case of an injury to a man in a field would probably be governed by *Cox v. Burbidge*.

[*ante*, p. 100.]

primâ facie liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities. The cause of action is the propensity of the animal, the knowledge of the defendant, and the injury to the plaintiff. The conclusion is, therefore, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to secure it at his peril, and that if it does mischief, negligence is presumed without express averment." It is to be observed that nothing turns on the animal being at large or being ill-secured, but that the liability depends solely on the keeping; as was said by Platt, B., in *Jackson v. Smithson*: "No doubt a man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person then the act of keeping it becomes, as regards that person, an act for which the owner is responsible."

The *scienter* is the gist of the action.

15 M. & W.
563.

It is to be observed further that the defendant's *knowledge* is an essential to the action: but the inquiry seems to be not to the knowledge of the ferocity of the particular animal, but of the ferocity of the class to which it belongs. In many cases, such as of lions or tigers, this knowledge would be presumed; but in other cases, as in the case of the monkey, both the propensity of the class, and the knowledge of the propensity of the class, would have to be brought home to the defendant. If the Court thinks that everybody knows this with regard to the class in question, then possibly it would be taken *primâ facie* that the defendant knew. Further, as we shall see, it is the propensity to do the act which has caused the injury, and not to do acts which are only generally attributed to wild animals.

In some cases *scienter* of the particular animal, in others, of the class to which it belongs.

It is usually said that domesticated animals which have resumed their savage nature come under the same rules as those *feræ naturæ* — as in *Jackson v. Smithson*, where the

injury was by a ram "accustomed to attack, butt, and injure mankind." It seems possible, however, that this (like the case of ferocious dogs) is only an instance of the rule of liability for injuries from animals *mansuetæ naturæ*, which would depend on whether the defendant's knowledge extended to the propensity of this ram in particular or of rams in general.

(β.) *By animals mansuetæ naturæ.*

Scienter of the particular mischief.

As to these animals the rule is clear beyond doubt that the knowledge of the defendant must be shewn of their propensity to do the act in question.

1 Stark: 212.

Must be very strictly proved.

This is well illustrated by the case of *Hartley v. Halliwell*: the action was against the owner of a dog for killing sheep, the allegation being that the defendant knew that the dog was accustomed to kill sheep: but the proof given in support of it was that the dog had previously sprung on a man. This was held to be insufficient, unless it could also be shewn that every dog which jumped at men would of necessity bite sheep. The Court said, however, that possibly if the declaration had been more general, by alleging the dog to be of a ferocious and savage disposition and that it ought not to be left at large, the action would have been maintainable.

6 Ex: 699.

[*ante*, p. 101.]

So in the bull case (*Hudson v. Roberts*), where the plaintiff, who wore a red handkerchief, was gored, the Court was satisfied that the defendant knew his bull would run at anything red. The judgment in *Cox v. Burbidge* affords another illustration of this; but in saying that it was not usual for "horses to kick children on the highway," it may be doubted whether Erle, C.J., did not stretch the principle too far: the question whether the defendant knew that his horse kicked would appear to have been sufficient (1).

[*ante*, p. 99.]

(1) So in *Sanders v. Teape*, the question which was apparently in the mind of the Court was whether it was usual for the defendant's dog to jump over walls on to people's necks. The case is by no means free from difficulty. One point seems clear: that, supposing a sheep jumped over the wall, and to have damaged both the labourer and the occupier of the land, the labourer, as a

(γ.) *Bites by Dogs.*

The commonest class of cases in which *scienter* is discussed are those in which the plaintiff has been bitten by a ferocious dog. And as to these the rule we have just discussed applies; it will be necessary, however, to examine a few cases to see (i.) how it applies, that is, what amount of knowledge is requisite; (ii.) what amount of notice will be construed into knowledge.

(i.) *What amount of knowledge constitutes scienter.*

It has often been said that a dog is allowed at least one bite, but this notion has sprung from an expression of Cockburn, C.J., in the Scotch appeal of *Fleming v. Orr*, that "every dog became entitled to at least one worry;" but the case was one of worrying sheep, and injuries to cattle or sheep are regulated by 28 & 29 Vict. c. 60.

Rule as to a dog's first bite.
2 Macq: H. L. 14-

It is now settled that it is unnecessary, in order to render the master liable, that the dog should have bitten anyone: it is sufficient to shew that the master knew that it had evinced a savage disposition by attempting to bite people: *Worth v. Gilling*. In that case the plaintiff had judgment because it was proved "that the dog uniformly made every effort in his power to get at any stranger who passed by, and was only restrained by his chain." He had not succeeded in biting anybody till he caught the plaintiff; but he had been bought for his ferocity.

Knowledge of savage disposition sufficient.
L. R. 2 C. P. 1.

So in *Jones v. Perry* the defendant was held liable, it

Examples.
2 Esp: 482.

licensee, could only have a right of action against the owner of the sheep, if the occupier of the land could in an action of trespass have recovered as special damage the injury to himself; and this, being as we have seen a question independent of the vice of the animal, he could undoubtedly have done. How then is the question altered by the rules as to trespasses by dogs? We are clearly thrown back on the test in the case of personal injury, which is knowledge; and this seems to necessitate the question proposed above; it is difficult to find any other. It seems a curious excuse from liability that the accident occurred from the animal's playfulness.

being proved that the dog had been bitten by a mad dog, and that the defendant had a suspicion of his madness by tying him up.

The mere fact of telling a person to beware of the dog will not exempt the owner from liability, it will rather be evidence against him of his knowledge of the dog's propensity: supposing of course the plaintiff to be guilty of no negligence and to be lawfully on the premises: *Judge v. Cox*.

2 Stark: 285.

1 Esp: 203.

In *Brock v. Copeland* the plaintiff failed: he was the defendant's foreman, and knew that a ferocious dog was kept for the safety of the premises loose in a yard: he incautiously went into the yard and was bitten.

(ii.) *What amount of notice constitutes knowledge.*

Examples of
notice given to
others than
the master.

It is essential that the owner or person under whose control the dog is should have notice of the animal's propensity. But the question arises whether notice to a servant will affect the master with notice.

36 L. J. C. P.
153.

In *Gladman v. Johnson* a message sent to the master through his wife was held to be sufficient, but the case has been doubted.

L. R. 7 Ex:
325.

In *Baldwin v. Casella* the defendant had deputed to his coachman the care and control of the dog, and therefore a notice to him of the vicious nature of the dog was held to be notice to the master.

33 L. J. Q. B.
310.

In *Stiles v. Cardiff Steam Co.* it was held that notice to or knowledge in the manager or person having control of the yard would have been sufficient: but that the knowledge of some men in the yard who had the charge of the horses was insufficient.

L. R. 9 C. P.
647.

And in *Applebee v. Percy* notice had been given to people who, in the absence of their master, had the management of the business; it was held that there was evidence of *scienter* to go to the jury.

General rule
as to notice.

The rule may be put shortly thus: the master will be held

to have known of the dog's vicious disposition, if a person in charge of the dog, or in charge of the place where he was usually kept, or in general charge of the entire premises, knows or has notice of it. The fact that the notice is given to a servant to communicate it to the master would seem to be insufficient if in fact the message was not communicated.

As a general summary of the law as to injuries by animals it may be said, that as to animals *feræ naturæ* the owner is not liable for their trespasses and consequent damage, but is liable for other injuries on proof of *scienter* as to the ferocity of the class to which the beast belongs, in some cases the *scienter* being assumed. Summary.

As to animals *mansuetæ naturæ* the owner is liable for their trespasses and consequent damage, but not for other injuries unless proof of *scienter* is given as to the propensity of the animal itself to do the act in question.

As to dogs, they seem to be ranked as *feræ naturæ* with regard to trespasses, and the ordinary consequences of trespasses, with a special rule as to extraordinary consequences; and as *mansuetæ naturæ* with regard to other injuries.

§ 9. KEEPING DANGEROUS THINGS. LIABILITY FOR TRESPASSES BY INANIMATE OBJECTS.

In considering the liability of their owner for injuries committed by animals, it will be remembered that the cases divided themselves into injuries resulting merely from keeping the animal on the owner's premises irrespective of any escape, these being for the most part injuries to the person; and injuries arising from the escape of the animal, these being either injuries to the person or injuries to property.

Passing now from animate to inanimate objects, and the liability of their owner for the consequences of keeping them, it is important to notice, first, how the facts in the two cases resemble one another. Injuries may result merely from keep-

Injuries may
arise from

inanimate
objects in
different ways.
(a) Independ-
ently of any
escape ;

[*Post*, p. 238.]

(b) in conse-
quence of an
escape ;

which may
injure person
or property.

[*Post*, p. 160.]

ing a thing on the premises, which under certain circumstances may become an element of danger, irrespective of any escape ; these, as before, being for the most part injuries to the person. We shall consider this class of cases under that branch of the law of negligence which is usually called "Invitation," or the duty cast on owners of property towards people who come on that property, as volunteers or trespassers, licensees, or by express or implied invitation. It is conceived that no difference of principle can exist between the duty in respect of a pool of water on the land or a hole in the floor, and that in respect of the storage of dangerous matter, such as explosives, or the accumulation of matter giving off vapours dangerous to the health of persons coming on the premises.

Again, injuries may arise from the escape of an inanimate thing from its owner's premises. Things which are liable to escape unless kept within bounds, are usually called "dangerous things;" they may be dangerous in themselves, or become dangerous by being unrestrained. The following are familiar instances of such escapes: water from a broken reservoir, filth from a privy, fumes from chemicals, sparks from a fire. And these injuries, as before, may be either to the person or to property. The former are usually called nuisances, though both are frequently classed under that head. These will be considered under the leading case of *St. Helen's Smelting Co. v. Tipping*. The latter form a group which are usually taken by themselves, under the somewhat misleading head of "Bringing dangerous things upon a man's land"; although in considering them the Courts have adopted arguments of analogy with the animal cases already discussed. A distinct general duty has been alleged to have arisen in consequence of keeping dangerous things, but it is obvious that the only circumstances which are peculiar to the class is the keeping something, whether an animate or an inanimate object, which is likely from its nature to injure persons without any active interference on the part of its owner. Injuries to property caused by such things result from the failure to keep

the so-called dangerous thing, or some of its component parts, within the limits of the owner's property. When the thing escapes an ordinary trespass is committed, that is to say, a trespass by the owner of the thing. There does not seem, therefore, so far as this class is concerned, any real necessity for considering a peculiar duty as having been created by, for example, the keeping reservoirs or chemical factories; the only question which has to be noticed is that the escape of such things cannot be said to be involuntary on the part of the person who keeps them.

[cf: p. 209.]

Rylands v. Fletcher is the leading case on the subject. The facts were as follow: The defendants constructed a reservoir on their own land, which was separated from the plaintiff's colliery by intervening lands. Under the defendants' ground was a mine which had been partially worked at some time beyond living memory: these workings communicated with workings under the intervening land. Soon after the plaintiff commenced to work his colliery he made arrangements to work out the mines under the intervening land, and by this means his works were made to communicate directly with the old works under the defendants' ground: some time after these communications had been made the defendants made a reservoir on their property. The excavations cut through some old shafts, which were apparently filled up, but which led down to the old workings below. This fact, and the fact of the underground communications with the plaintiff's mine, were unknown to the defendants. They employed contractors to do the work. When the water was admitted one of these shafts burst, and the plaintiff's mine was flooded. The Court of Exchequer held the defendant not liable: the Exchequer Chamber reversed this judgment, and this decision was upheld by the House of Lords.

L. R. 3 H. L. 330.
Case of accumulation of water.

Two principles were laid down by Lord Cairns. First, the owners or occupiers of land may lawfully use it for any purpose for which it might, in the ordinary course of the enjoyment of land, be used: and if in the natural user of that land

The use of land may be (i.) ordinary or (ii.) extraordinary.

there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation had passed off into the plaintiff's land, he could not have complained. If he had desired to guard himself against it, it would have lain upon him to interpose the necessary barriers in order to have prevented that operation of the laws of nature. But, secondly, if the owners or occupiers of land, not stopping at its natural use, desired to put it to a non-natural use for the purpose of introducing into it that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operations on or under the land; and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water escape on to other people's land, then that which they were doing they were doing at their peril, and are liable for the consequences.

Artificial
accumulations
of water fall
under (ii.).

L. R. 1 Ex:
265.

The making of a reservoir was what the Lord Chancellor termed a non-natural use of land, and consequently the case fell under the second principle, and the defendants were held liable. The same result was arrived at by Blackburn, J., in the Court below, and his argument was approved by Lord Cairns.

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems

but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench.

This case suggests many points for reflection.

Blackburn, J., considered the analogy between it and *May v. Burdett* (the monkey case) complete. It may not, however, be unimportant to notice two distinctions between the cases. There was no allegation that the monkey had escaped: and it was held that a *scienter* was essential to the action: "The gist of the action is the keeping the animal after knowledge of its mischievous propensities." A strictly analogous case of dangerous things would therefore be, the accumulation of matter from which the owner of them knew that noxious vapours were likely to be given off, and which were in fact given off to the detriment of a person lawfully coming on or near the property. *May v. Burdett* was, however, used really for the sake of another principle involved in it, namely, that the keeping of a wild animal is at the keeper's peril; that is to say, that the duty cast upon him is to keep it in at his peril, and not merely a duty to take all reasonable and prudent precautions in order to keep it in; and this rule was extended to inanimate things. The neglect of the first duty would be evidenced by the *mere fact* of a bite of an animal (as in *May v. Burdett*), or an escape of the thing; and in both there would be legal negligence. But the neglect of the second duty, if it were the law, would have to be evidenced by what is called "proof of negligence," that is, that the owner's conduct failed to satisfy the test of the prudent man.

The analogy between these and the animal cases considered. [*ante*, p. 102.]

[*cf.*: "Negligence": *post*, p. 217.]

But a more difficult question arises as to whether *Rylands v. Fletcher* does not overrule those cases lately noticed, which [*ante*, p. 98.]

Query are the cases of trespasses by animals *fera natura* over-ruled?

hold that the owner of a wild animal is not liable for the consequences of an escape if those consequences are damage to property. The principle laid down by Blackburn, J., would certainly cover such a case, but the learned judge, in the next paragraph of his judgment, refers expressly to damage to property by *tame beasts*. Bearing in mind the somewhat irrational complexities in the law as to damage by animals introduced by the propensity of the animal, the *scienter* of the propensity, and the difference drawn between damage to property and damage to the person, it seems with the greatest submission impossible to preserve any sound analogy between dangerous animals and dangerous things. No simpler or more useful rule to cover the whole subject could be devised than the one given by Blackburn, J., but it certainly does not cover the early law as to animals. It seems better, therefore, to accept it only as a statement of the law as to dangerous things, and as to these to adopt the distinction drawn by Lord Cairns as to the natural and non-natural use of land on which they are accumulated.

[67: p. 94.]

It is obvious that this view of the question excludes any further question arising as to making use of contractors to do the work.

We may now notice shortly one or two illustrations of either principle.

(i.) *Damage resulting from natural use of land.*

7 C. B. 564.
Damage resulting from natural flow of water.

In *Smith v. Kenrick* the owner of a coal mine on a higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water, percolating through the upper mine, flowed into the lower mine and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or

percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his (the plaintiff's) business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water in that case was only left by the defendant to flow in its natural course.

Plaintiff must protect himself.

In *Wilson v. Waddell* the House of Lords reaffirmed the principle they had laid down in *Rylands v. Fletcher*: the case, however, was held to fall within the first and not the second rule there laid down. The defendant had worked out the whole of his coal, and as a necessary result the surface sank into pits and cracked into open fissures, through which the rainfall flowed freely into the defendant's mines and so into the plaintiffs. It was held to be a natural user of the land, because the owner of minerals has a right to take away the whole of them; and the injuries resulting entirely from gravitation and percolation, the only ground on which the plaintiff could recover would be in respect of an obligation cast on the owner of the upper mine to restore the surface to its natural state of watertightness: and if there were such an obligation, there would also be one to make the underground workings as watertight as they were before the coal was removed, which it is clear does not exist.

per Lord Cranworth.
2 App: Ca: 95.
[*ante*, p. 109.]

There is no obligation on a mine-owner to restore surface to its natural condition.

The same rule applies where the natural course is altered, not only by *vis major* or act of God, but by any cause not the direct act of the defendant, nor the consequence of his neglect to exercise due care where such care ought to have been exercised. In *Carstairs v. Taylor* the plaintiff hired of the defendant the ground floor of a warehouse, the upper part remaining in the occupation of the defendant. The water from the roof was collected by gutters into a box from which it was discharged by a pipe into the drains. A rat had gnawed, through no negligence of the defendant, a hole in the box, through which the water entered the warehouse and wetted the plaintiff's goods. The collection of the water in the

The defendant is only liable if the injury can be traced directly to his unnatural use of his property.

L. R. 6 Ex: 217.

gutter being not for the sole benefit of the plaintiff, but for the joint benefit of both plaintiff and defendant, which benefit the plaintiff had accepted, the gutter became the natural course of the water; and it was altered from that course by no act of the defendant: "The accident was due to *vis major* as much as if a thief had broken the hole in attempting to enter the house, or a flash of lightning or a hurricane had caused the rent." The defendant was consequently held not liable.

L. R. 7 Q. B.
661.

Enquiry as to
what is the
natural state
of things in
the case of
houses in part
or wholly
demised.

Ross v. Fedden, also a case of occupiers of the same house, was decided on the same principles. It was there held that, in ascertaining whether the escape was due to a natural use of the land or premises, in order to apply the rules laid down in *Rylands v. Fletcher* to the case of adjoining occupiers of sets of rooms, the natural state of things must be taken to be the state of the premises, with the flow of water through cisterns and pipes, when the plaintiff took them. The duty then cast on the respective occupiers is to use the premises with reasonable care, and unless a neglect of this duty is shewn, no action in respect of damage caused by an overflow will lie.

The yew-tree
case.
L. R. 7 Q. B.
31.

Clippings fall-
ing on neigh-
bour's land
and eaten by
his cattle.

The decision in *Wilson v. Newberry* must be noticed as emphasizing the rule that the damage must result directly from the fact of the accumulation by the defendant. In this case the defendant had a yew tree on his land, the clippings of which, it was alleged, he knew were dangerous. Some clippings fell on his neighbour's ground, and the plaintiff's horses ate them and were poisoned. The Court held that the declaration disclosed no cause of action, because there was no allegation that the defendant clipped the trees, or had anything to do with the escape of the clippings. There is an obvious distinction between the accumulation of water which must find its own level, or of a compound which gives off noxious vapours which pass naturally through the air, and the planting of a yew tree, which can do no damage to a

neighbour until another act—the clipping of its branches and allowing them to fall on neighbouring land—happens which brings its dangerous qualities into action. It is not the mere storing of dangerous property on a man's property which he must do at his peril, but the storing of such dangerous property as is liable to escape of its own accord, or such property as is liable to escape of its own accord and in its escape become dangerous. The true principle of liability.

On the other hand, the mere storing of dangerous property would seem (from an analogy with the case of the children playing with a horse and cart left untended in the street), to be accompanied with this duty, that it must be so stored that no reasonable man would anticipate the interference of the new agency which actually caused the escape. Thus the storage of material inflammable at a fairly high temperature, without sufficient protection from the heat of the sun, would probably involve the owner in liability for damage caused by an explosion, the result of this unreasonable exposure. [*post*, p. 168.]

This case of the yew-tree clippings affords us an excellent illustration of what has been already said on the subject of trespass; a test from the principles of remoteness of damage having been applied. Although the case was apparently decided on the insufficiency of declaration to bring the case within the rule of *Rylands v. Fletcher*, taking the same statement of facts it may be looked at from an entirely different point of view, namely, that of trespass. It was clear that there had been a trespass by the falling of the clippings on the neighbour's land; but without an averment that the defendant had caused this trespass to be committed, there was the possibility that they had been blown down, or if clipped, had been clipped by a stranger, or even by a servant outside the scope of his employment: it would thus be an involuntary act so far as the defendant was concerned, for which, as we shall see, he would not have been liable. [*ante*, p. 109.]

Plaintiff non-sued because act was not traced to defendant.

There are other cattle-poisoning cases (from yew trees and other causes) which must be noticed, as it has been said that [*post*, p. 209.]

[ante, p. 114.]

they overrule *Wilson v. Newberry*. In these judgments much emphasis has been laid on the fact that it was a technical decision: but, as we have already said, that case appears to be consistent with sound principle, and to be an exceedingly valuable one.

3 C. P. D.
254.

Cattle straying
through
broken fences
and eating
poisonous
things.

In *Firth v. Bowling Iron Co.*, the plaintiff and defendant were occupiers of neighbouring closes, the defendant being bound to maintain the fence. The fence was of wire rope, which fell into decay, and some of the strands falling on to the plaintiff's land, his cattle swallowed them and died. The Court held, that the damage was the natural result of the defendants' breach of duty in not maintaining the fence. From *Lawrence v. Jenkins* it is clear that even if the strands had fallen on the defendants' land, and the plaintiff's cattle, getting through the defective fence, had swallowed them, the defendant would have been liable.

[post, p. 166.]

In these two cases the question was very different from that raised by the facts in *Wilson v. Newberry*; it was purely one of remoteness of damage. There had been a breach of duty in not maintaining the fence, and the fence being of wire the defendant's liability depended on an affirmative answer to the question, Ought he as a reasonable man to have foreseen what in fact took place? There can be little doubt that the answer must be Yes.

4 Ex. D. 5.

In *Crowhurst v. Amersham Burial Board* the facts were again entirely different. The plaintiff's horse, feeding in his own meadow, ate of part of a yew tree which was planted in the burial-ground, and which projected over the plaintiff's meadow. The board was held liable, on the authority of *Rylands v. Fletcher*. But there was here clearly a trespass, the result of the intentional act of the defendants in planting the tree and in not restraining its growth within the limits of their own property.

[ante, p. 109.]

It seems clear that if there had been no trespass, if the tree had been entirely on the defendants' ground, and the

horse had reached over the wall to feed on it, there would have been no ground of action.

(ii.) *Damage resulting from non-natural use of land.*

Of the liability of the owner for damage resulting from unnatural accumulations, the principal case of *Rylands v. Fletcher* is an example. [ante, p. 109.]

In the early case of *Tenant v. Goldwin*, the defendant was held liable for the escape of filth from his own cellar, the wall being out of repair, into his neighbour's cellar. Blackburn, J.'s remarks upon this case should be read with the greatest attention. The point he insists on is shortly this: that the Court *did not go upon the solebat* (that the plaintiff's cellar *used* to be separated and fenced from the defendant's privy), *or the jure debuit reparari* (that the wall by the defendant of right ought to have been repaired); for there was a sufficient cause of action appearing without this. The reason here is, "that every one must use his own so as thereby not to hurt another: as, suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else." 1 Salk: 21, 360. L. R. 1 Ex: at p. 283.

The recent case of *Ballard v. Tomlinson* falls within this principle, though it is a somewhat more complicated example. The owner of a well allowed filth to accumulate at the bottom of it; this escaped and polluted the water which supplied his neighbour's well. The Court of Appeal held that he was liable. With regard to underground water, the rights of the owners of the soil are simply that each may take all he can get, whether by natural or artificial means: *Chasemore v. Richards*. Consequently the fact that the plaintiff had accumulated the water artificially in his own well was immaterial. What then had the defendant done? He had allowed filth to accumulate in such a place and in such a 29 Ch: D. 115. Case of neighbouring well-owners. 7 H. L. ca: 349.

manner that it escaped into the water which supplied both wells, and was, as an inevitable consequence, carried by that water into his neighbour's land.

15 C. B. N. S.
376.

Unnatural in
addition to
natural accu-
mulation of
water.

[*ante*, p. 112.]

L. R. 7 Ex:
305.

[*ante*, p. 109.]

In *Baird v. Williamson* the owner of an upper mine did not merely suffer the water naturally percolating into it to flow through his mine without leaving a barrier between it and the mine below, but, in order to work his mine beneficially, he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. The natural percolation may be considered as having arisen from the act of God, and for not restraining this the owner of the upper mine would not be liable (see *Smith v. Kenrick*); but the unnatural flow was the act of the defendant, for which he was consequently held liable for the damage caused by it.

Smith v. Fletcher is another illustration. The defendant's mines communicated with the plaintiff's, as shewn in the facts of *Rylands v. Fletcher*. In the surface of the defendant's land were certain hollows and openings partly caused by, and partly made to facilitate, the defendant's workings; and across the surface ran a watercourse. The banks of the watercourse burst in consequence of exceptionally heavy rains, and the water escaped and accumulated in the hollows and openings, where the rain had already caused an unusual amount of water to collect, and thence by fissures and cracks it passed into the defendant's mine, and so into the plaintiff's. It is most important to notice that it was accepted as a fact that if the land had been in its natural condition the water would have spread itself over the surface, and have been innocuous. Although the facts will be seen to vary considerably from those in *Rylands v. Fletcher*, in the fact that there the hollow was made for the water, while here the water came into hollows not intended to hold it, yet the same principle was applied. "If," said Bramwell, B., "for their own purposes they had diverted this flood into the hollow when it

came, then, though not knowing what would happen, it is clear they would be liable. Why are they not if it comes, because it must come, from natural causes? It is to be observed that the mischief the defendants have done is not merely in causing the water to come but to stay, and stay in a leaky hollow. If it had come and could have got away, as before the hollow existed, there would have been no harm; nor would there have been if the hollow had been watertight." The resemblance between the two cases is therefore this: "that allowing water to accumulate without its natural outlet is not the natural use of land, and it is not by the operation of the laws of nature alone that water passed into the plaintiff's mine."

And this question was also determined, that the fact that the plaintiff had really benefited was no answer: this we have [see, p. 137.] considered elsewhere.

So we have this general principle: if a danger (as from accumulated water) has come upon my land, which cannot get off owing to its natural configuration, or from the form it has assumed from my natural use of it, it is a non-natural use of it to provide an outlet on to my neighbour's land: I cannot void the danger by passing it on to him (see *Whalley v. Lancashire and Yorkshire Ry. Co.*). But, on the other hand, if the danger has not already come, I may take all precautions to prevent its damaging me when it does come, even though the danger is common both to my neighbour and myself; and if the result of my precaution be to aggravate the damage occasioned to my neighbour from the danger when it does come, still I am not liable. (*B. v. Pagham Commissioners*—the sea-wall case; *Neild v. London and North-Western Ry. Co.*, where Bramwell, B., said, "The law allows a reasonable selfishness in such matters: it says, 'Let everyone look out for himself and protect his own interest;' and he who puts up a barricade against a flood is

13 Q. B. D.
131.
Probable
damage may
be prevented,
even though
the prevention
injures the
neighbour.

8 B. & C. 355.
L. R. 10 Ex:
4

entitled to say to his neighbour who complains of it, 'Why did you not do the same.' " (1)

No cause of
action for
merely detain-
ing natural
flow of water.

A remark of Mr. Bigelow [Leading Cases, p. 496] must be noticed here: "The class of cases represented by *Fletcher v. Rylands* must not be confused with those in which the defendant is permitted to divert or retain upon his own premises mere surface water from rain or snow, running in no defined channel, which, but for the diversion or retention, would find its way into the plaintiff's land and benefit him. This, by all the cases, he may do, though the result is damage to the plaintiff. But this, according to the English doctrine, seems to be the extent of the rule, and if the defendant has diverted the water (whether surface water or not), or at least obstructed and collected it for his own purposes, he must keep it away from his neighbour at all hazards." There are no English cases directly bearing on the question, but it would seem to be a legitimate deduction from the principle under discussion.

Statutory
accumulations.

3 C. P. D.
168.

It is important, however, to notice that what would otherwise be a non-natural use of land becomes, if sanctioned by the Legislature, a natural use of it. Thus, in accordance with the foregoing principles, it was held in *Hardman v. North Eastern Ry. Co.* that, where water had collected on an artificial mound of *refuse* on the company's property, and had percolated through their wall into the plaintiff's house, the defendants were liable. But where the mound is an embankment for carrying the line of rails constructed as authorized by the Act, the new condition of the land becomes thenceforward its natural condition, and the neighbouring land-owners must submit to an aggravated flow of water if it is thereby caused to pass on to their land, in the same way as they must submit to the smoke which comes without negli-

3 Bl: N. S.
414.

(1) This may, however, be limited to cases of extraordinary danger, so as to exclude cases of danger to which the property is naturally subject (see the Scotch case: *Menzies v. Breadallbane*).

gence from the engines, and destroys their fruit and trees; and to anything which occurs from the natural use of the land in its new condition (see *Hammersmith Ry. Co. v. Brand*). L. R. 4 H. L. 171.

But the company on their part must also submit to the consequences of their embankments, and if water accumulates, even to the extent of threatening the existence of the railway, they are not entitled to cut holes through the embankment to allow the water to escape on to neighbouring land. That would be a non-natural use of the land in its then condition: *Whalley v. Lancashire and Yorkshire Ry. Co.* If the holes were sanctioned by the Act the case would fall under the first principle. 13 Q. B. D. 131.

So it is as to the company's liability for sparks falling from a passing train. Where the legislature has authorized the use of locomotive engines, and consequently the carriage of fire in the engine, it is usually said that if a spark ignite the fields or stacks along the track the company is not liable unless negligence is proved: *Vaughan v. Taff Ry. Co.*; but that, unless the right to use such engines is express, then the ordinary rules apply, and the company carry fire at their peril: *Jones v. Festiniog Ry. Co.* In other words, if they have not this right the company are liable, however much care they take to restrain the sparks; but if they have the right, the precautions they take to restrain the sparks will be judged of by the prudent man test. Accumulation of fire; liability for sparks therefrom. 5 H. & N. 679. L. R. 3 Q. B. 733. [cf. the chapter on Negligence.]

It would seem nevertheless that the doctrine of *res ipsa loquitur* applies to such cases: that is to say, that negligence will be presumed from the fact of the fire having occurred from a spark: see *Piggot v. Eastern Counties Ry. Co.*; *Aldridge v. G. W. Ry. Co.*; *Fremantle v. L. & N. W. Ry. Co.* [cf. p. 221.] 3 C. B. 229. 3 M. & G. 515. 10 C. B. N. S. 89.

So, where a company has a statutory power to make a canal, they are not bound to keep the water in at their peril, but only to take reasonable precautions to keep the water in its proper channel: *Whitehouse v. Birmingham Canal Co.*; *Lawrence v. Great Northern Ry. Co.* On the same principle a The same rule applies to canal, 27 L. J. Ex: 25. 16 Q. B. 643.

water, and gas
companies.

water company was held not liable where the water escaped from the pipes in consequence of a fire-plug being forced out of its place by an unusual frost: *Blyth v. Birmingham Waterworks Co.*

11 Ex: 781.

The same may be said of gas companies with regard to their gasometers and mains.

CHAPTER V.

Of Damage and Damages.

THE relation of the damage to the injury, and the damages which may be recovered in respect of it, is perhaps one of the most important questions in the law of Torts.

The first principle is expressed in the old maxim, *ex damno sine injuriâ non oritur actio*: that is to say, damage which is not the result of a legal injury does not give a cause of action: in other words, however great the damage which has been suffered, before the party suffering it is entitled to recover, he must prove a violation of a right possessed by him, or a breach of a duty owed to him.

Damnum
without
injuria gives
no action.

Cases therefore in which the plaintiff fails to obtain a verdict are usually illustrations of the maxim; but it would serve no useful purpose to accumulate precedents in such a work as the present: a digest of them would amount to no more than a series of statements that such and such rights and duties, which have been claimed to exist, do not exist. One simple example must suffice by way of illustration.

A claim was made for damages for what was called an "invasion of privacy by opening windows;" it was dismissed, for it was clear that the defendant had acted within his rights in opening the windows in his own house. The fact that by so doing he overlooked the plaintiff's property invaded no right in the plaintiff, because a right to privacy is unknown: *Tapling v. Jones*. And so in the common case of rivalry in trade: a man may be ruined by another shop being opened in the same street, or by another in the same trade underselling him, but he has no cause of action.

Example
where alleged
right held not
to exist.

11 H. L. ca:
290.

The important question now to be considered is, what damages a person is entitled to recover against a tortfeasor.

Damages
awarded as
compensation
or punish-
ment.

In torts the first principle of damages is that they are assessed by way of compensation to the party injured; the second, that they may also be assessed as a punishment to the party injuring.

Compensation
is the import-
ant principle.

Compensation, however, is the essential ingredient; and when the tort is established, a verdict for the plaintiff for the pecuniary equivalent, whatever this may be, must follow. In many cases of injury to property the damage is infinitesimal, and where this is the case the compensation is represented by the smallest copper coin of the realm. In injuries to the person or reputation the actual damage suffered is difficult to estimate; but if the jury are satisfied that some damage must in the usual course of events follow, although the parties might never be able directly to trace it to the injury (for example, the falling-off of custom—as distinguished from the loss of particular customers), or, if they think the right a valuable one (for example, the right to vote), they are justified in awarding substantial damages.

Vindictive
damages.

Again, the motive of the defendant may be taken into consideration, and vindictive damages may be awarded.

Special
damages.

In addition to the general damages which may reasonably be supposed to flow from the injury, special damages may be alleged, and if proved recovered. That is, as the name imports, special items of damage which can be distinctly traced to the injury. For example, a doctor's bill and necessary journeys to the sea-side in cases of an injury to the person; loss of a specified customer from an injury to reputation; damage to a shrub from a trespass.

Remoteness of
damage.

But for very obvious reasons some limitations to the liability of a man for the consequences of his acts have been introduced; these will have to be specially considered under the well-known head of Remoteness of damage.

Division of
the subject.

The heads, therefore, under which the law as to the recovery

of damages must be considered are as follows:—Nominal Damages—Substantial Damages—Vindictive Damages—Special Damages—Remoteness of Damage.

We shall also have to consider the case of the right to recover damages for a peculiar or individual injury for the breach of a public duty.

§ 1. NOMINAL DAMAGES.

The most usually accepted definition of nominal damages is that given by Maule, J., in *Beaumont v. Greathead*. The term means, “in fact, a sum of money that may be spoken of but which has no existence in point of quantity.” This principle has been applied to contracts with the strictest possible interpretation of the words used; for where the plaintiff is entitled to recover a debt and also nominal damages for its detention, the farthing is held to be merged in the greater amount of the debt. Thus, in the above case, payment of £50 was held to be a good discharge of a debt of £50 and damages. And again, the jurisdiction of a Court being limited to the recovery of £50 on contract, it was held that an action for £50 and nominal damages could be entertained: *Joule v. Taylor*.

2 C. B. 494.

Maule, J.'s definition of nominal damages.

7 Ex: 58.

But this definition, though it is perhaps satisfactory in cases of contract, can hardly be said to be applicable to cases of tort. In these cases we very frequently find verdicts for nominal damages so called, the amount given being one shilling in some cases, in others forty shillings. These two amounts, together with the farthing, in fact are the accepted forms which this verdict takes.

The subject of nominal damages is rendered somewhat difficult of satisfactory explanation by the introduction of what is frequently put forward as a third and independent rule of damages, namely, that the violation of a right entitles the owner of it to recover nominal damages: and the consequences

The rule that damages may always be recovered for the violation of a right, requires much consideration.

of this are said to be that as he is entitled to these damages, it is sufficient for him in some cases to prove the existence of the right, and the violation of it, and that whether he has suffered damage or not he is entitled to the verdict; whereas in other cases it is said that "special damage is the gist of the action," which leads us to suppose that in these cases the plaintiff must not only prove the existence of the right and the violation of it, but also that he has suffered from the violation.

[cf: p. 306.]

The true rule is to be found in the principle of presumption of damage.

[*ante*, p. 11.]

Nominal damages where tangible loss has occurred.

2 W. Bl: 1233.

4 T. R. 71.

2 East 154.

We have already, in the introductory chapter, hinted that this might possibly be explained by supposing in the first class of cases, the right to exist simply; and in the second class, that it is a right not to be injured. Take slander for instance: that I, a tradesman, have a right not to be called a seller of bad wares: but that I have only a right not to be damaged by being called an immoral man. No more unsatisfactory distinction could well be devised. The true answer is to be found, however, in the principles of presumption of damage, to which we shall have to make frequent reference. In some cases, from the very nature of the tort, the law presumes damage: that is, the plaintiff is not put to the trouble of proving it; in other cases, the law does not presume damage: that is, the plaintiff is required to prove its existence. This being so, the right, as we have already pointed out, is in all cases, not to be injured: in my person, my reputation, or my property, as the case may be.

The cases in which nominal damages are given, may be, for the sake of illustration, divided superficially into two classes. The first is best illustrated by a group of cases in which actions have been brought by one commoner against another for surcharge of, or other damage to, the common: *Wells v. Watling*; *Hobson v. Todd*; *Pindar v. Wadsworth*. The question in them all was said to be this, whether *any* injury had been done to the common; any act that would lessen the profit of the common in the smallest degree. If this were proved in the affirmative it would support an action against

the wrongdoer. The question was merely upon the nature of the defendant's act, not the greatness or smallness of it. And where this act was the abstraction of manure, or the diminution of the pasture, and the plaintiff commoner's proportion of the damage caused was found only to amount to one farthing, yet the minuteness was held to be no ground for nonsuit.

In these cases the injury or violation of the right was clearly established, and so also was the loss resulting from it; and though it was something tangible—manure or pasture—yet it was infinitesimal; it had, nevertheless, to be estimated at its pecuniary value, and the estimation was, therefore, of a sum of money also infinitesimal; in other words, the farthing was considered the nearest financial equivalent to the loss sustained.

Take another case, *Wood v. Waud*. The action was 3 Ex: 748. for the pollution of a natural stream. The defence was that the stream was already so polluted by the mill-owners above that it was impossible to *appreciate* the degree of additional pollution caused by the defendant, although the *fact* that this additional pollution existed was certain. The plaintiff, nevertheless, was held entitled to a verdict, and the damage being inappreciable, the damages were assessed at a farthing.

Now, in these cases, which are typical of the first class of nominal damage cases, the injury having resulted in the loss of something tangible, however minute that something may have been, it is easy to comprehend that the farthing, or the shilling, does represent what the jury presume to be the financial equivalent of the injury sustained or damage suffered, and that this financial equivalent is given as compensation.

In the second class of cases the injury has not resulted in the loss of something tangible. These are cases of slander, false representation, and the like; and it is from these that the rule to which we have adverted has been derived, namely, that for the violation of the right nominal damages may be recovered, whether damage has or has not been suffered. But

Nominal damages where intangible loss has occurred.

in all such cases, more especially where the right violated is the right to reputation, the damage sustained is never tangible: when it takes the form of loss of custom, that is another consequence of the illegal act, a second right, the right to property, having been violated as well as the right to reputation. There is no difficulty, however, where the damages given are substantial, in accepting the fundamental principle of damages, that they are given by way of compensation: that is to say, for a great injury to the reputation, heavy damages are given. It is not easy to understand why the same principle should be lost sight of, and another principle introduced, when the injury to the reputation is minute and nominal damages are given.

It may be said that so long as the right to recover nominal damages is understood, it matters very little on what principle it rests; it is conceived, however, that if it is possible to explain all the rules of damages on consistent principles, a very great advantage will be gained. We shall have occasion to point out at least one glaring inconsistency to which the misunderstanding of the rule as to nominal damages has led.

- 1 Taunt: 121. To revert to this second class of cases; in *Feize v. Thompson*, where the jury, being unable to ascertain and estimate the amount of damages which the plaintiff had sustained, although the legal injury was clear, found for the defendant, the verdict was set aside, and the Court entered a verdict for the plaintiff with sixpence damages. And again, in *Pontifex v. Bignold*, an action for false representations as to the affairs of an insurance company, whereby the plaintiff had been induced to effect an insurance: it was argued that the plaintiff had not suffered any pecuniary damage, but Tindal, C.J., said this really amounted to saying that he was not "*much hurt*."
- 3 M. & G. 63.

Holt, C.J.'s
dictum in
Ashby v. White.
1 Sm: L. C.
264 [8th ed:]

It is true that in the famous case of *Ashby v. White*, Chief Justice Holt said: "Surely every injury imports a damage, though it does not cost the party one farthing, and it is im-

possible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage: for it is an invasion of his property, and the other has no right to come there." The remarks we have already made seem to apply with special force to this dictum, for the words are as applicable to cases where substantial damages are recovered as to those in which the damages are only nominal; they indeed point to the main principle of damages, that whatever form the injury takes the damages are to compensate the person injured; of which injury pecuniary loss, such as the purchase of diachylon plaister, may of course be but a small component part.

We propose now to examine more fully certain groups of cases in which the right to nominal damages has been discussed.

The first group contains cases in which actions have been brought against the sheriff for an alleged breach of duty either for allowing an escape or for withdrawing from an execution.

Nominal
damages in
sheriff cases.

In *Williams v. Mostyn*, the action was for an escape, the sheriff having the defendant in custody on mesne process; the jury negatived actual damage but the judge gave a verdict for nominal damages. The Court of Exchequer held there was no damage, "either in law or in fact": they held also that there had been no breach of duty towards the plaintiff: "If the plaintiff had sued out a writ of *habeas corpus* during the defendant's absence from prison, and had been prevented from executing it; or had offered to deliver a copy of his declaration and had been prevented, he would have had a right of

4 M. & W.
145.

Delay of suit
sufficient.

action; for delay of suit, however short, is necessarily a damage."

2 N. & M. 831.

If bankruptcy occurred before seizure, there can be no damage.

In *Bales v. Wingfield* an action was brought against the sheriff for neglecting to sell under a *fi. fa.* The sheriff's duty was laid down to be to sell without delay, and that if he did not, the plaintiff would be entitled to nominal damages. But there had been a fiat issued in bankruptcy, and the question in issue in the case was whether this bankruptcy occurred after the seizure. In *Wylie v. Birch* there was no doubt that the fiat had issued before the seizure: and the sheriff's plea setting up the fiat was sustained as negating at once the right even to nominal damages.

L. R. 7 Q. B. 175.

In actions against the sheriff actual damage must be proved.

In *Stimson v. Farnham* a similar question was discussed, the sheriff relying on a valid bill of sale which had been set up. Cockburn, C.J., said: "The action is founded on tort. Now the rule respecting such actions against the sheriff is that, not only must a wrongful act have been committed, but damage must have been thereby caused, in order to entitle the person injured to maintain the action. Here it is clear that no damage was sustained, for the moment it was ascertained that the bill of sale was *bonâ fide* and valid, no matter what the return of the sheriff had been, the goods were not available, they could not have been sold for the benefit of the plaintiff the execution creditor, and therefore he has not suffered"—and Blackburn, J.: "An action against a sheriff for a false return will not lie unless actual damage has been caused to the plaintiff."

Now in these sheriff cases the first inquiry is, was the sheriff right or wrong in doing what he did; secondly, if there has been a breach of duty on his part, has the plaintiff's right not to be injured by such breach of duty been violated? If the sheriff was right the plaintiff can have suffered no wrong, and his claim for damages must fall: it becomes *damnum absque injuria*. *Williams v. Mostyn* and *Wylie v. Birch* were rested entirely on this point. In *Bales v. Wingfield* the facts were in dispute, but the same principle was laid down.

4 M. & W. 145.

4 Q. B. 566.

2 N. & M. 831.

In *Stimson v. Farnham* the judgment was rested chiefly on another question, the necessity for actual damage: the facts, however, were such as to bring the case within the first principle, for the sheriff was held to be right in what he did. The necessity for actual damage was said, however, to be a necessary ingredient in the right of action. It must be carefully borne in mind that "actual" does not mean "substantial," but from what we have already said includes "nominal." We have therefore this second proposition: even assuming the sheriff to have been in the wrong, the plaintiff must prove that he has suffered *some* damage to entitle him to a verdict either for nominal or substantial damages. But this is only another way of saying that in actions against the sheriff the law does not presume damage. But the damage which the plaintiff has to prove need not necessarily be pecuniary: as was said, for example, in *Williams v. Mostyn*, "delay of suit, however short, is necessarily a damage."

L. R. 7 Q. B. 175.

"Actual damage must be proved," means that the law does not presume damage.

Lastly, there is the case of *Hobson v. Thellusson*. The sheriff was instructed to seize goods of a judgment debtor: a deed of assignment was produced; the jury found that it ought to have been disregarded, and that in not disregarding it the sheriff had committed a breach of duty. But the assignment was an act of bankruptcy, and the Court believed that the creditors would act upon it, in which case the trustee's title would relate back to the act, and the judgment creditor would get nothing by his execution: therefore the possibility of damage, even of the minutest kind, was at once excluded, and judgment was given for the defendant. *Planck v. Anderson* was decided on the same principle: the injury to the plaintiff, if any, would have been in consequence of a delay in his suit. There had been an escape, but no delay, and judgment was given for the defendant.

L. R. 6 Q. B. 642.

Case where no damage shewn and Court refused to believe that any could have happened.

5 T. R. 37.

Now, in all these cases the necessity for the proof of damage is strongly insisted upon. It seems an error to explain this by saying that it is a peculiar feature of sheriff-law, for a tort

The sheriff cases examined.

by a sheriff can be governed by no different principles than torts by other people: what the law does say, however, is that in actions against a sheriff, the case is not of such a nature as to enable it to presume damage, and consequently it must be proved by the party complaining. The above cases amply illustrate the soundness of this position; from the facts it is clear that from breaches of the sheriff's duty damages do not follow as a matter of course, consequently it would be impossible for the law to presume damage in all cases: where it does not exist the plaintiff's right not to be injured by the sheriff's breach of duty cannot have been violated, and he must be nonsuited: where damage is shewn to have resulted from the breach, however small the damage (e.g. the delay of suit by one day; or the deprivation of the control of goods for a short period: see *Thesiger, L.J. : Hirst v. London & North Western Ry. Co.*), he may recover it. *Clifton v. Hooper* (1) affords a good illustration of the way in which the rule of nominal damages, to which we have referred, sometimes leads eminent judges astray: the jury found that the sheriff did not do his duty. In making the rule for nominal damages absolute, Lord Denman, C.J., said, "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount." Because the sheriff did not do his duty, therefore it was said the plaintiff's right was violated: but, as we have seen, the plaintiff's right is not to be damaged by the sheriff's breach of duty: when this right is violated, damages of course follow.

4 Ex: D. 188.
6 Q. B. 468.

[cf: p. 340.]

Reversioner
may bring
action for in-
jury to rever-
sion only.

The principles which regulate actions for trespass brought by a reversioner afford another illustration of the necessity for proof of damage in certain cases. Trespass is *prima facie* a violation of the right of possession to property, and

(1) There is a distinction noticed in many old cases between arrest on *meane* and final process. The old law seems to point to a presumption of damage in the latter case and not in the former. The modern cases do not warrant the distinction being made.

therefore a reversioner can only bring an action when the reversion is damaged. To entitle him to a verdict even for nominal damages, he must shew that the reversion has suffered actual damage, the magnitude of the damage will be decided by the jury: *Baxter v. Taylor*; *Young v. Spencer*. The tenant may therefore sue in respect of damage to his possession, and the reversioner in respect of damage to his inheritance: *Jesser v. Gifford*.

4 B. & Ad: 72.
10 B. & C.
145.

4 Burr: 2141.

In actions by commoners, the rule as to nominal damages varies according to the person against whom the action is brought. An action may be maintained against strangers for damage however small; but for surcharge against the lord it is said that actual damage must be proved. The reason being that as against strangers, the commoner has a right to all the pasture, for example, that he can get; but as against the lord, he has only a right to a sufficiency of common, because the lord has a right to the remainder of the pasture. (See the notes to *Mellor v. Spateman*.)

Rule in actions
by commoners
for surcharge.
[ante, p. 126.]

In cases of abstraction and pollution of water, the law presumes damage. In *The Medway Navigation Co. v. Romney*, a corporation was constituted for the purpose of regulating the navigation of the Medway, the act conferring all the water upon the company. The defendant had abstracted water, and the plaintiffs were held entitled to a verdict for nominal damages without proof of actual damage to the navigation. A similar right was vested in the Rochdale Canal Co., the right to abstract water for certain purposes being given to riparian owners: water was taken for other purposes, and the company had judgment in two cases for nominal damages, without proof of any actual damage: *Rochdale Canal Co. v. King*; *Rochdale Co. v. Radcliffe*.

1 Wms:
Saund: 346 b.

Abstraction
and pollution
of water.

30 L. J: C. P.
236.

14 Q. B. 122.

18 Q. B. 287.

In these three cases the plaintiff's rights were clearly defined by statute: in the following cases it was found necessary to examine the nature of the right claimed with the greatest care. In *Williams v. Morland* the right to a calm flow of water was claimed; the allegation was that in consequence of

2 B. & C. 910.

works above the plaintiff's property the water had been caused to flow more impetuously than before, and that his banks had been damaged thereby. The jury negatived any damage whatever. The Court held that he was clearly not entitled to a calm flow of water, but on the other hand that he was entitled not to have his banks damaged in the slightest degree; the jury consequently negatived his cause of action at once (1).

6 Ex: 353.

1 C. B: N. S.
590.

7 Ir: Rep:
C. L. 23.

In *Embrey v. Owen*, *Sampson v. Hoddinott*, and *Claxton v. Claxton*, the principle was laid down that the right being established, although there was no sensible diminution of the natural flow of the stream, and although there was no actual perceptible damage, the action was maintainable for nominal damages. In the first case the plaintiff failed because he claimed an absolute and exclusive right to the flow of all the water in its natural state, to the exclusion of the rights of reasonable and authorized use by riparian owners above him. In the second case the plaintiff successfully proved a right to excessive use by prescription, which had been interfered with. In the third case the right to discharge surface water by a specific channel was established.

Cases of no
presumption
of damage.

Now in the actions against the sheriff, in those for damage to the reversion, and in those for surcharge of common against the lord, the first enquiry is as to the existence of the right alleged to have been violated. This is for the purpose of ascertaining whether the first element of the tort, the *injuria*, exists or not. The second enquiry is as to the damage suffered by the plaintiff, in order to establish the second element of the tort, the *damnum*.

Cases of pre-
sumption of
damage.

In the actions for abstraction or pollution of water, as well as in those for surcharge of common against strangers, the first enquiry is as before, as to the existence of the right

L. R. 1 Sc: &
D. 47.

(1) This case must not be confused with *Bickett v. Morris*, in which damage was presumed from the mere fact of encroachment: the right in question there being the inviolability of the *alveus* of the stream.

alleged to have been violated, and as to its nature, or the proper limitations imposed upon it by reason of rights existing in the defendant. But once this has been ascertained, the rule applicable to these cases is that "no actual damage need be proved," but that the plaintiff is entitled to nominal damages: in other words, the second element, the *damnum*, is presumed by law.

Now it is quite clear that the meaning of the word "actual" here is "substantial"; in many cases it is coupled with "sensible," or "perceptible," or "appreciable." The facts of all the cases shew without possibility of doubt that some damage, infinitesimal though it may be, has been suffered; whether it be the loss only of a pint of water or of a blade of grass; as neither substantial nor special damages are claimed, the facts of the case are sufficient of themselves to prove the minute damage in respect of which damages are claimed. Therefore it is said that in these cases, and in many others of a similar nature, the law presumes damage, and the minute pecuniary compensation is awarded accordingly.

Meaning of
"actual"
damage.

We must now proceed to examine more fully the meaning of this phrase, The law presumes damage. In the first place, the question whether or not in a given class of cases the law does presume damage, is to be answered by the presence in the judgments in cases falling within the class of declarations that damage must be proved, or that actual damage need not be proved: the cases in which it need not be proved are the cases in which damage is presumed by law; and, on the other hand, the cases in which it must be proved are the cases in which damage is not presumed by law. Now if these cases are carefully examined, the reason for the presumption, or for the absence of it, becomes very apparent: in all cases where it is presumed the injury is of such a nature that it is impossible but that damage or loss to the plaintiff should have followed the act. The presumption is only that some small damage has followed, and,

The reason for
presuming
damage ex-
plained.

consequently, that the plaintiff is only entitled to nominal damages by way of compensation : if substantial damages have been, or are likely to be, suffered, that is a question for the plaintiff to shew and for the jury to estimate, and lies outside the question of the presumption of law. If we take, for example, the abstraction of water from a river which belongs wholly to me : it is clear on the face of it that I have suffered some damage, either in the amount of water taken, or in the price which I could have charged for allowing it to be taken if my permission had been asked. So in the pollution of water, the fact of the pollution is sufficient of itself to shew that my property has been injuriously affected. On the other hand, in the sheriff cases, as has already been pointed out, it is impossible to say that damage must of necessity flow from the act; and it is only where it flows of necessity that the presumption of law is raised. The real difficulty, however, arises in cases where the damage is intangible, as in damage to reputation. In slander there are five cases (libel being one of them) in which the law presumes damage; in these cases (for example, where the words spoken relate to a man in his business or profession) the law holds that it is in the natural order of things that damage should follow the speaking of the words, and that it is impossible to suppose anything else but that damage has or will so follow. But in all cases of words which do not fall under one of these five heads, the law does not consider that damage must follow as a matter of course, and therefore it does not presume damage in such cases, but calls on the plaintiff to shew what damage he has in fact suffered. Let us take a familiar illustration.

[*cf.*: Jessel, M.R.,
Cooper v. Crabtree, 20 Ch. D.
at p. 592.]

The same
principle
governs
damage to
reputation.
[*cf.*: p. 305.]

Illustration of
this principle.

In casual conversation in the cricket field, and without any enquiry made of me on the subject, I assert that a certain professional is very careless, and is always bowling "no-balls." I also make the same remark of an amateur. The professional would be entitled to bring an action against me without proving actual damage, the amateur would not unless he could prove damage, assuming both assertions to be untrue :

for I have slandered the professional in his profession or business, and I have not so slandered the amateur. The reason for the difference is not far to seek. The law (which is an elliptical expression for the judges who first elaborated the rule) endeavours to appreciate human affairs, and the human nature which conducts them. And in this endeavour it propounds to itself this question: This man and that man have had untrue words spoken of them. Is it probable that damage will follow the words? With regard to this man, Yes. For it is more than probable, for example, that if the person to whom they were addressed should at some future time require to engage the services of a professional bowler, he would remember the warning he had received, and would not employ a person who was always bowling no-balls. And moreover the unfortunate professional would perhaps never hear of the engagement he had lost. Therefore in the case of this man it is just to presume that some damage will follow: the amount will be left to the jury to estimate. But in the case of that man, the amateur, no such considerations arise. He has nothing but his amusement depending on his skill as a bowler, and it is improbable that any damage will follow the speaking of the words; therefore, in his case the presumption as to damages will not be made. So we see that, whether the injury be tangible or intangible, whether it be the loss of a little manure, or the loss resulting from a damaged reputation, the law considers the nature of the act, and determines whether damage must follow of necessity, or need not follow, as the case may be. If it must of necessity, or will in all probability, then damage is presumed; but if it need not, then damage is not presumed. And when once it has arrived at this determination, it is impossible to rebut the presumption; it is useless for the defendant to endeavour to shew that no damage had been suffered, it would be useless to shew that possibly the plaintiff has derived a benefit, it is useless for the jury to find (as they do in some cases) that no damage has been in fact suffered; the presumption being in the plaintiff's favour, he is entitled to a verdict for at least

The presumption of damage cannot be rebutted.

nominal damages, and nothing can deprive him of it. But if the presumption is not in his favour, then he must prove the damage (great or small) that he has suffered.

[*Post*, p. 308.]

Recent cases illustrative of this principle.

[*ante*, p. 24.]

52 L. J. Q. B. 488.

[*cf.* p. 287.]

The origin of the rules as to presumption, more especially in slander, are lost in the mists of antiquity: but if the old cases are carefully examined, very decided traces will be found of this attempt to appreciate the natural course of events, notably in the case of words tending to disherison. That this is the guiding principle of the rule is illustrated in a remarkable manner by the way in which the Courts deal with new cases. In *Twycross v. Grant*, where the enquiry was whether damage must be proved in an action brought by an executor, Lord Justice Bramwell's remarks were entirely directed to the question whether from the nature of the injury the personal assets must not have been diminished. And so in the recent case of *Quartz Hill Mining Co. v. Eyre*, in which the question was whether an action would lie for maliciously and without reasonable and probable cause presenting a petition to wind up a company without proof of damage, the arguments of the learned judges were directed solely to the enquiry whether the act did not necessarily and as a natural consequence involve damage. "I do not see," said Bowen, L.J., "how such a petition can be presented and advertised in a newspaper without striking a blow at the credit of the company." "An action will lie by reason of the special damage which is involved *ex hypothesi* in the very institution of winding up proceedings which are unjust" (1).

L. R. 1 Sc. & D. 47.

(1) In *Bickett v. Morris*, an action for an encroachment on the *alveus* of a running stream, the following expositions of the law by the Scotch judges were approved by the House of Lords. Lord Benholme said: "Without my consent (*i.e.*, the consent of the proprietor of the other side of the river) you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may be the result, no human being with certainty knows, but it is my right to prevent your doing it; and when you do it, you do me an injury, whether I can qualify damage or not." And Lord Neaves said: "Neither can any of the proprietors occupy the *alveus* with solid erections without the consent of the other, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question."

When this principle is fully understood it carries with it also the clear comprehension of the relation in which damages stand to the law of torts, and explains what is meant by the maxim *ubi jus ibi remedium*. Whatever be the nature of the right, it must always be understood to be a right not to be damaged in a certain way; and when I have been so damaged, the law provides me with a remedy and gives me adequate compensation.

Infinite trouble is caused, however, by the use of such words as "actual" and "inappreciable." Where the jury negative the existence of actual or appreciable damage, what is generally meant is that the plaintiff has suffered no substantial damage, and this finding sometimes becomes exceedingly troublesome and complicates matters, when the nature of the case in which it is given is lost sight of. From what we have said it will be seen that actions for damages are divided into two classes of cases, the first where damage is presumed from the nature of the right violated: the second where damage is not so presumed, but has to be proved. Now in the first class, as we have seen, the finding is immaterial, and cannot rebut the presumption of law; in this case the words generally mean substantial. But in the second class the finding is very material, for it negatives the plaintiff's claim. In such cases there must be actual and appreciable damage, although it be small: although it is probable that the maxim *de minimis non curat lex* applies to such cases.

Effect of finding of jury that no actual damage has been suffered, depends on whether presumption exists or not.

Application of maxim *de minimis*.

The case of *Smith v. Thackerah* affords the best illustration of this second class. The question arose out of the right to lateral support under the following circumstances. A dug a well near to B's land, which sank in consequence, and a building erected on it within twenty years, fell: the jury found that the plaintiff's land would have sunk if there had been no building upon it, but that he would have suffered no appreciable damage.

L. R. 1 C. P. 564.

To understand this verdict it will perhaps be as well to append the following note to the case by the learned editors of *Smith's Leading*

Cases, vol. i. p. 291. "In the report, however, of the same case in 35 L. J.: O. P. 276, it does not clearly appear that the buildings did not contribute to the subsidence (see argument of defendant's counsel and the judgment of Byles, J.); and the finding of the jury that had the building not been there the plaintiff would have suffered no appreciable damage, was perhaps equivalent to a finding that the subsidence which would have taken place had the building not been there would have been inappreciable, and that the weight of the buildings actually contributed to the subsidence which actually took place."

Examination
of "right of
support."

The case was evidently an attempt to get nominal damages because of the violation of the so-called right of support. But the right to support means the right not to be damaged by the withdrawal of the support. The law does not presume damage to follow as a necessity from this withdrawal, and therefore there is no immediate cause of action; but when the damage occurs in consequence of the withdrawal, then the cause of action arises. Consequently, in *Backhouse v. Bonomi*, it was decided that the Statute of Limitations does not begin to run until the subsidence actually takes place. In the chapter dealing with that Statute it will be remembered that attention was drawn to the different periods from which the Statute begins to run in cases where the law presumes damage, and in cases where damage has to be proved.

[*ante*, p. 32.]

[*ante*, p. 31.]

We have already given one example of the way in which the principle, that for every violation of a right nominal damages may be recovered, has led to an erroneous conclusion from an omission to enquire what the right in fact was.

1 R. & M. 161. *Nicklin v. Williams*, also a case of support to land, furnishes us with another. Parke, B., said he considered the action was for an injury to a right, and that there was a complete cause of action when the wrong was done, and not necessarily only when damage was sustained by reason of the wrong; and he added that when so much of the land was taken away as to deprive the plaintiff's land of the support to which he was entitled, a cause of action accrued, though no actual damage occurred by the sinking of the land or falling of the house (in other words, that the law presumed damage in such

a case). This was expressly disapproved from in *Mitchell v. Darley Main Colliery Co.* 14 Q. B. D. 125.

These are cases, however, which are said to be brought in order to establish a right; and on account of the importance of rights generally, the damages are said to be given in order to prevent a conflicting right being acquired by prescription. This is clearly the result: the declaration that a right has been violated carries with it the statement that the right exists; but to put it as the cause is to confuse ends with means. This point cannot be better expressed than it is by Mr. Justice Story in the American case of *Webb v. Portland Co.*: *a fortiori* the doctrine of damage applies, "when- ever the act done is of such a nature as that by its repetition or continuance it may become the foundation or evidence of an adverse right."

Cases which are brought to establish a right do not differ from others.

3 Sumner, U. S. Rep: 189.

The importance of recognising this as an *a fortiori*, is well instanced by the defendant's argument in *Rochdale Canal Co. v. King*, where it was said that the plaintiffs could not recover even nominal damages because, the act being prohibited by statute, its repetition could not give rise to a right. [ante, p. 133.]

In concluding this section we propose to examine a few isolated cases in which nominal damages have been given.

Examples of cases in which nominal damages have been given.

In the *Tunbridge Wells Dippers' Case* the defendant had dipped bathers without having been chosen for the post by the homage according to statute; it was not proved that she had received any gratuity, but the plaintiffs were held entitled to a verdict, in order to prevent the possibility of damage; the case was put thus, the action will lie "for a possibility of a damage and injury: for example, for persuading A. not to come and sell his wares at the market of B., the lord of the market may have his action."

2 Wils: 414.

In *Patrick v. Greenway* (cited in the notes to *Mellor v. Spateman*), the defendant fished in the plaintiff's several

1 Wms: Saund: 346b.

fishery, but caught nothing. The Court of Common Pleas refused a rule to shew cause why the plaintiff's verdict should not be set aside, because of the infringement of the right which could hereafter be evidence of the exercise of the right by the defendant.

4 B. & Ad: 410. In *Blofield v. Payne* the defendant imitated the plaintiff's hones and the envelopes in which they were sold, thereby injuring his right; the plaintiff had a verdict although no express loss of custom was shewn.

1 Bing: N.C. 549. In *Bower v. Hill* the plaintiff's right of way on a stream was obstructed, but the damage was problematical on account of the state of the stream: the verdict was for the plaintiff, for if he had acquiesced in the obstruction it would have become evidence of a renunciation of his right of way.

6 C. B. 703. Example of presumption. In *Couling v. Coxe* the plaintiff sued the defendant for disobeying a subpoena to give evidence in his favour; the verdict on some of the counts was for the plaintiff with one shilling damages; but on the plea "that the plaintiff had no cause of action against his opponent," it was for the defendant. The Court gave judgment for the plaintiff *non obstante verdicto*. It was argued that "the existence of actual damage or loss is essential to the action, as the law will not imply a loss to the plaintiff from mere disobedience to the subpoena;" but the answer given by the Court was "yet here he may have sustained damage in respect of costs of some of the issues in the trial if the witness had come." The allegation that the defendant was a material witness was held, therefore, to be sufficient to carry the verdict. The right in such cases is, therefore, to have the attendance, not of any person promiscuously, but of any person *whose evidence is material*.

9 Co: 113a. Example of absence of presumption. In *Marys's case* the rule was laid down as to actions by masters for the beating of their servants: "If the servant is beat, the master shall not have his action unless he lose the service; the servant shall for every small battery; the master has no damage but by a *per quod*: so that the original act is not the cause of the action, but the consequent upon it." In

[cf: "Seduction," *post*, p. 358.]
Example of
absence of
presumption.

this case the right primarily violated is the servant's, but if this lead (*per quod*) to the violation of another's right, it gives rise to another cause of action. But the violation of this other person's right must be proved—that is, damage is not presumed, but must be shewn; because it does not of necessity follow that from beating a servant the master will lose his service, the form of damage which the law recognises in such cases. This case resembles those in which damage to the reversion has to be proved.

In all of these cases—and instances might be multiplied without end—the rights alleged were respectively established, and in none of them was actual damage required to be proved. In all of them from their nature the Court was enabled to presume damage, and none of them admitted of the argument that by no possibility could damage have arisen.

In all of them, very probably, the reason why the action was brought was, except in the last, in order to establish a right, or rather to prevent the defendant from acquiring an adverse right by prescription; but they are all cases in which the enquiry has been whether the act is such in its nature as to produce damage, in which cases, as we have seen, the presumption of law is that damage has been suffered, and, consequently, where only nominal damages are sought, no proof of damage is necessary. The only one which presents any difficulty is the fishing case; but this was evidently a case of trespass, and in all cases of trespass damage is presumed, whatever form the trespass may take. It is not difficult to account for this; because it is impossible to say even from the mere act of walking on a man's land that no damage can possibly have accrued: and if it does not take the form of damage by injury to the grass, it may take the form of depriving him of the charge for coming on the ground which he was otherwise entitled to make (*per* Jessel, M.R., in *Cooper v. Crabtree*).

These
examples
examined.

Presumption
in trespass.

20 Ch. D. at
p. 592.

In trespass, then, the rule is well established that damage need not be proved. In *Feize v. Thompson*, "Heath, J., cited 1 Taunt: 121.

a case of trespass, in which Grose, J., was of counsel, where no evidence being given of the precise amount of the injury sustained, the jury refused to give any damages, and on application the Court ordered a verdict to be entered for the plaintiff, with one penny damages."

The damage suffered must be "temporal" damage, *i.e.*, capable of a financial equivalent.

It is important to bear in mind that damages are the financial equivalent for the damage suffered. The right to recover damages, whether nominal or substantial, must therefore depend on the possibility of finding a financial equivalent for what has occurred to the plaintiff: this is usually expressed by saying that the plaintiff must have suffered temporal damage to entitle him to bring an action. This rule applies, of course, only to cases in which the law does not presume damage; although it is to be observed that where damage is presumed, it is presumed on the hypothesis that temporal damage must follow the act.

Loss of *consortium vicinorum* not temporal.
1 Lev: 261.
5 B. & S. 384.
Other examples.

In cases of slander where damage has to be proved, there is an old rule which says that the loss of *consortium vicinorum* is not sufficient to support the action (*see Barnes v. Bruddell*). A recent example of this is to be found in *Roberts v. Roberts*. By reason of defamatory words the plaintiff lost the membership of one of the private societies of a sect which had been constituted for religious or spiritual purposes. Cockburn, C.J., held that the action would not lie, because it amounted "at most to no more than the loss of the merely nominal distinction of being able to call herself a member of it": and "it did not appear that any real or material advantages attached to membership; such as a seat in chapel, or the opportunity of attending divine worship there." The learned judge said further that if the loss had been the exclusion of the plaintiff from the meetings of religious worship, or from any substantial right attaching to membership, it would have supported her action.

The same principle was applied in *Chamberlain v. Boyd*.^{11 Q. B. D. 407.} The claim alleged that the plaintiff was a candidate for membership of the Reform Club, but upon a ballot of the members was not elected: that a meeting of the members was called to consider an alteration of the rules regarding the election of members; and that the defendant falsely spoke certain words concerning him, by reason of which he "induced, or contributed to inducing, a majority of the members to retain the regulations under which he had already been rejected, and thereby prevented the plaintiff from again seeking to be elected to the said club. The plaintiff thus lost the advantage, which he would have derived from again becoming a candidate with the chance of being elected." The Court of Appeal held that no temporal damage had been sustained. Lord Coleridge, C.J., said, "The damage alleged is unsubstantial and shadowy, and is in truth incapable of being estimated in money": and Bowen, L.J., "I do not say that if the defendant by speaking the words complained of had actually prevented the election of the plaintiff, the latter might not have had a cause of action . . . but all that is stated is that the plaintiff was prevented from again *seeking* to be elected. The defendant's words did not deprive the plaintiff of all chance of being elected; they only deprived him of 'a' chance. But the chance of an advantage is not the same as the advantage, and the risk of an injury is not the same as the injury."

e.g., loss of chance of advantage not temporal damage.

But to lose the hospitality of friends has been held to be temporal damage: see *Davies v. Solomon*.

[*post*, p. 310.]

§ 2. SUBSTANTIAL DAMAGES.

It being borne in mind that the first principle on which damages are assessed is that of compensation to the party injured, it follows that no special rules can be laid down under this second head. The plaintiff is entitled to recover his actual loss, and whether that loss be nominal or sub-

Actual loss may be recovered.

stantial the jury must assess its pecuniary equivalent. The work the jury have to perform is easy when the loss is admittedly nominal, but it becomes exceedingly difficult when it is alleged to be substantial; more especially when the damage is intangible, as in injuries to the person or to the reputation.

[*ante*, p. 125.]

This principle of "actual loss" tends to remove all difficulties in the way of applying Mr. Justice Maule's definition of nominal damages to those verdicts in which the nominal damages of one shilling or forty shillings have been given. These verdicts are usually called "nominal," but they in fact represent the jury's ideas of the pecuniary value of the right lost or injured.

1 Sm: L. C.
264 [8th ed:]

In the leading case of *Ashby v. White* the right in question was the right to vote at elections. The jury found for the plaintiff, but their estimate of the value of his loss is not given in the report. But Holt, C.J., said during the argument: "By my consent, if such an action comes to be tried before me I will direct the jury to make him pay well for it: it is denying him his English right: and if this action be not allowed, a man may be for ever deprived of it. It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make."

Same act may
produce differ-
ent conse-
quences on
different
people.
1 B. & Ad:
415.

14 C. B. 595.

Again, a similar act may be productive of different results according to the person injured or the resulting circumstances. Thus in *Marretti v. Williams* the wrongful dishonour of a customer's cheque by a banker was held to entitle the plaintiff to nominal damages only; whereas in *Rollin v. Steward* a verdict for £500, which was reduced by consent to £200, was allowed to stand. So the nature of the act itself may be such as to entitle the jury to presume that substantial damage must follow: as in *Tripp v. Thomas*, where, in case for words, the defendant suffered judgment by default, and on the writ of inquiry the plaintiff offered no evidence in aggravation. The jury gave a verdict for £40, and the Court held they were not bound merely to give nominal damages.

3 B. & C. 427.

As to the power of the Court to reduce damages assessed by the jury, the judgments of the Court of Appeal in *Belt v. Lawes* should be read.

12 Q. B. D.
356.

It is important to keep substantial damages perfectly distinct from special damages, which we shall consider shortly. In *Rose v. Groves* the plaintiff had a right to have his house accessible to people passing on the river; the defendant floated timber in front of his landing-stage, thereby preventing people from landing, and injuring the plaintiff in his custom. The jury were satisfied that this loss had in fact occurred, and awarded £20 damages; and the Court refused to disturb the verdict merely because no special instances had been proved of customers going away.

5 M. & G. 613.

So also it is important to remember that the rules as to remoteness of damage are specially applicable to this branch of the subject. With regard to what may be included, apart from these rules, we must notice specially that damages may be awarded in respect of *future loss*. "The jury ought to take into consideration the prospective injury which might be thought likely to occur at the time when the action was brought" (Brett, M.R., *Mitchell v. Darley Main Co.*). It is however important to distinguish, as was there done, between a continuous injury, such as a subsidence extending over a considerable period of time, and a succession of injuries, such as happened in that case.

Damages may
be given in
respect of
future loss.

14 Q. B. D. at
P. 134.

Generally, subject to these remarks, the damages are only limited by the loss sustained.

Thus in actions against the sheriff for failure to seize goods in execution, *prima facie* the damage is measured by the whole value of the goods which might have been seized: *Hobson v. Thelluson*; and, in the old cases where the seizure had been on *mesne* process, it being uncertain whether the plaintiff would have recovered or not in his action, it was held he could only recover such damage as he could shew he had sustained; but if he could prove that he had lost the

L. R. 2 Q. B.
642.

¹ M. & Rob: 227. whole, he was entitled to recover the whole with costs: *Scott v. Henley*.

⁵ Taunt: 442. The judgment of Gibbs, C.J., in *Merest v. Harvey*, throws a great deal of light on the principle of assessment of damages, shewing that there are other questions to be considered beyond the mere pecuniary loss to the plaintiff, more especially in cases of trespass. It affords also a good illustration of the next division of the subject—vindictive damages.

I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, "Here is a halfpenny for you, which is the full extent of all the mischief I have done"? Would that be a compensation? I cannot say that it would be.

Rule as to continuing nuisances.

Closely connected with this subject is the rule with regard to continuing nuisances. It has been invariably held that the continuance of the nuisance gives rise to a second cause of action. For example, damages recovered in an action for erecting buttresses were held to be no bar to the recovery of damages for continuing them: *Holmes v. Wilson*.¹ See also *Westbourne v. Mordant*;² *Penruddock's Case*;³ *Some v. Barwisk*;⁴ *Shadwell v. Hutchinson*;⁵ and *Thompson v. Gibson*,⁶ where the fact that the defendant could not remove the nuisance without committing a trespass was held to be no defence in the second action.

¹ 10 A. & E. 503.
² Cro: Eliz: 191.
³ 5 Co: 100b.
⁴ Cro: Jac: 231.
⁵ 4 C. & P. 333.
⁶ 7 M. & W. 457.

§ 3. VINDICTIVE DAMAGES.

Under this head we may shortly consider the second principle on which damages are assessed, punishment on the person causing the injury.

The plaintiff may give evidence of anything showing the defendant's desire to increase the natural injury which could result from his act, such as malice. "It has always been held, that for trespass and entry into the house or lands of the plaintiff, a jury may consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult or injury:" *Abbott, J., Sears v. Lyons.* There seems indeed little limitation to the jury's discretion in this matter as to the amount awarded. Two cases will suffice by way of illustration. *Huxley v. Berg* was an action for trespass in breaking into a dwelling-house: the plaintiff's wife was so terrified that she fell ill and died. This was held to be no substantial ground of damage; but the evidence was admitted by Lord Ellenborough, L.J., to show how outrageous and violent the breaking was.

Defendant
may be
punished by
heavy damages
for malignant
motives.

2 Stark: 317.

Examples.

1 Stark: 98.

In *Forde v. Skinner* a pauper's hair was cut off by order of the master of a workhouse against her will. The order was alleged to have been given for the sake of cleanliness, but there was evidence given that it was done for the purpose of "taking down her pride." In summing up, Bayley, J., told the jury to consider whether in their opinion this did not constitute malice. "You will therefore decide," he said, "on the motives which actuated the defendants, and according to that decision you will estimate the amount of damages." The jury found a verdict for the plaintiff with £60 damages.

4 C. & P. 239.

Bracegirdle v. Orford is an important case. It was an action of trespass for breaking a dwelling-house under a false and unfounded charge and assertion that the plaintiff had stolen property in her house, *per quod*, she was injured in her credit. It was argued that evidence on this point ought not to be admitted, because although apparently put in to aggravate the damage, it was really combining an action for slander with the trespass, and the time for the slander, being shorter, might have expired. Lord Ellenborough, C.J.,

2 M. & S. 77

held the evidence was admissible, the *per quod* being laid as a matter of aggravation.

§ 4. SPECIAL DAMAGES.

The term
"special
damages" is
used in two
ways.

The subject of special damages is somewhat confused owing to the different ways in which the term is used. In a technical sense "special damages" are damages that can be particularised. But the term is also used with regard to those cases in which the law does not presume damage, that is to say, in which damage has to be proved. In those cases it is said that special damage is the gist of the action. It is by no means clear, however, whether in these cases the damage proved must be what we have called technical special damages. For example, in an action for words spoken against a man in his business, the law presumes that he will be injured, and the jury will be allowed to assess the damage they think fairly commensurate with the injury; but if the plaintiff proves that he has lost specific customers, this is an item of technical special damages. But in a case falling outside the five instances of defamatory words in which damage is presumed, if the plaintiff proves that he has lost custom, tracing it of course distinctly as the result of the wrongful act, he proves that he has been damaged by the words; but he does not prove technical special damages. One of the questions to be determined is whether he ought to prove it by shewing the loss of specific customers.

Reason for
rules of plead-
ing special
damage.

Turning first to technical special damages, the origin of the distinction between special and general damages is to be found in the rules of pleading, which allow the defendant to insist on a certain particularity of claim, and require that items of damage which can be distinctly traced shall be notified to the defendant, in order that when evidence is called to substantiate it he may be prepared either to rebut it by his own evidence, or to break it down by cross-examination. This particularity is also necessary in order that the items of claim

may be tested by the rules as to remoteness of damage. Most of the cases which have to be considered under the head of remoteness of damage are examples of claims for special damages, the enquiry being whether specific heads of damage can be recovered. The only practical principles to be noticed under this head are, the rule that the plaintiff cannot recover special damages unless they are specifically alleged, and the enquiry whether he has alleged it with sufficient distinctness.

A few instances will suffice. In *Pettit v. Addington* the plaintiff in an action for false imprisonment was not allowed to prove that he had suffered in health; nor, in *Lowden v. Goodrick*, that he was stinted of food in prison; nor, again, in *Holtum v. Lotun*, in respect of two days' imprisonment which resulted from a remand by the magistrate before whom the case was first heard. In each case the claims were for special damages which had not been laid. So under a claim in respect of loss of lodgers, the plaintiff was not allowed to prove the loss of a particular lodger, "because the number was not so great as to excuse a specific description on the score of inconvenience:" *Westwood v. Cowne*.

Peake, 62.
Cannot be re-
covered unless
claimed speci-
fically.
Peake, 46.

6 C. & P. 726.

1 Stark: 172,

8 T. R. 130.

But in *Hartley v. Herring*, an action was brought for slander imputing incontinence, by a person employed to preach to a certain dissenting congregation, from which he derived emolument; he alleged that by reason of the slander "persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had and otherwise would have given"; and it was held that it was unnecessary to give the names of the people who had so refused (1).

(1) The principle which distinguishes these two cases was dwelt on by Gould, J., in *Iveson v. Moore*: "In actions upon the case, where damages are only recoverable [*i.e.*, in which, as it is said, special damage is the gist of the action], a precise certainty of the damages is not necessary to be shewn in the declaration, and therefore this general method of shewing his damage will be well enough. As if an action be brought by the master for battery of his servant, who cannot maintain the action unless he has received special damage by it, as loss of the service of his servant, yet if he declares that he has lost the service of his servant *per magnum tempus*, it is well enough.

1 Raym: 486.

"Where the damage is the result of a single instance, as in case for words by

It is doubtful whether, when actual damage must be proved, it must be proved specifically.

The case is clearly one of those cases of slander in which the law does not presume damage, and it is an authority to shew that in such cases, when it is said that "special damage is the gist of the action," technical special damage need not be proved. It is believed that this is the rule, notwithstanding several dicta to the contrary (2).

[*cf.*: also "Slander," and the cases there cited, *post*, p. 310.]

1 Esp: 48.

On the other hand, the rules as to technical special damages apply to these cases as well as to those in which the law presumes damage when they are alleged. Thus in *Ashley v. Harrison*, the case in which it was afterwards ruled that an action would not lie for libelling a performer on the stage, who in consequence refused to act, whereby the plaintiff lost the profits of her performance, special damage was the gist of the action supposing the plaintiff could have succeeded. But items of special damage were not alleged. Consequently Lord Kenyon, at *Nisi Prius*, refused to allow this question to be asked of the box-keeper of the theatre: "In consequence of Madam Mara's declining to sing, did not several persons give up their boxes?" But he allowed the witness to be asked generally "whether the receipts of the house had not diminished from the time Madam Mara had declined to sing:" because "to ask if particular persons had not in consequence given up their boxes was special damage, and should have been specially laid in the declaration."

the speaking whereof the plaintiff *maritagium amisit*, there the plaintiff ought to shew that there was a communication of marriage between him and J. S., &c. But where the damage is complicated, and is greater or less according to the fewness or number of instances, there the law is otherwise. And if the law were not so, it would be very inconvenient; for in the present case [one of loss of custom] it would be almost impossible for the plaintiff to shew all the names of his customers, &c. It is like the case of Mr. Harris, the counsellor, who brought an action upon his case for false and scandalous words spoken of him, *per quod* he lost his clients, without naming them."

Holt, C.J., and the majority of the Court gave judgment for the defendant, but the case was afterwards argued before all the judges of the Common Pleas and Exchequer, and they were all of opinion that the action lay.

1 Ex: D. at p. 94.

(2) In *Riding v. Smith*, Kelly, C.B. said that the special damage must be established not merely by general evidence that the business had fallen off, but by shewing that particular persons have ceased to deal with the plaintiff.

So, in *Evans v. Harries*, an action for slander in business, 1 H. & N. 251. there was a general allegation of loss of custom, and also of special loss in respect of certain customers: this last was not proved, but the plaintiff was held entitled to damages for the general loss.

If this be the true rule, there is very little reason for retaining the term "special damage" in the second and non-technical sense. The cases in which it is said to be of the gist of the action are simply cases in which the law does not presume damage, but in which it has to be proved; we have hitherto always made use of the expression, where the law does not presume damage, the plaintiff must prove that he has suffered actual damage before he can succeed in his action; and this seems to be a satisfactory statement of the law. The different cases of slander afford excellent illustrations of this, as also the cases for seduction of servants, *per quod* the master *servitium amisit*, and numerous others which will be found in the course of this work.

The subject is confused by the non-technical use of the term.

The most important class of cases in which the term special damage is used are those in which the plaintiff has been injured by a public nuisance. But this class depends on principles peculiar to it, which must now be independently considered.

§ 5. SPECIAL DAMAGE TO THE INDIVIDUAL ARISING FROM BREACH OF PUBLIC DUTY.

We proceed now to consider the very important rule of law which is commonly called the right of an individual specially damaged by the breach of a public duty (generally a public nuisance) to bring an action for damages. All that has been said in the last section as to the necessity of keeping technical special damages distinguished from the special damage, which is the gist of an action, applies to this section; and we therefore propose to use the term "special injury" in order to keep the distinction clear, and to preserve, as far

Peculiar injury to individual.

Duties of "one to all"
[*"The Common Law."*]

Such duties are most usually imposed by statute, and are also aptly described by Mr. Holmes as duties of "one to all."

These two expressions, "all to all" and "one to all," convey very accurately the distinction between the two sorts of duties.

are also public duties

[*"Jurisprudence"*: pp. 67, *et al.*:]

This class includes also "public duties"; for the strict meaning of "public duty" seems to be, not a duty laid *on* all the public, but a duty *to* all the public. These public duties are what Austin calls "absolute" duties, and his statement in respect of them is that they give rise to no corresponding rights.

Austin's statement that there are no rights correlative to absolute duties examined.

There is no authority given for this statement, but it seems to have been based on this rule of law which we are now considering, which takes away the right of action where all, or many, are nominally damaged by breach of the duty; and the inference has been drawn that because there is no remedy there is no right. It is clear however that with regard to the duties of "all to all" the corresponding rights in all individually do exist, because the duties flow from the rights; but it does not seem quite so clear that all individually have rights in the case of the duties of "one to all," because the duties are created first. The rule as to actions is however practically the same. Multiplicity of actions for nominal damages is avoided in both classes; but actions for "special," that is, substantial injuries are allowed, also in both classes, by many or by few.

From the point of view of jurisprudence the question with regard to whether there are rights correlative to these duties is simply this: Is the action for nominal damages in respect of slight injuries *taken away*, or is the action for substantial injury *given*? (1).

(1) Another example of the right to recover small damages being taken away is to be found in the practice on interpleader summonses. If the master thinks fit, he may when he makes the order for an issue to be taken, direct that no action shall be brought against the sheriff; that is to say, in respect of the trespass which he has committed, if in the event it turns out that the execution should not have been put in.

The question was much debated in *Ashby v. White*, and Holt, C.J., laid down the law as follows:—"So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a public nuisance, every man shall have his action, as is agreed in *Williams' Case*, and *Westbury and Powell*. Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action; for in that case the law will not multiply actions. But it is otherwise when one man only is offended by that act. He shall have his action; as if a man dig a pit in a common, every commoner shall have his action on the case *per quod communiam suam in tam amplo modo habere non potuit*; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway; every passenger shall not bring his action, but the party shall be punished by indictment, because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action" (1).

1 Sm: L. C.
264 [8th ed.]

5 Co: 73a.
Co: Lit: 56a.

The case itself may be explained on many grounds. Assuming the right to vote to be vested in all the community, there was correlative to it a duty on all to abstain from interfering with it. There was in addition a positive duty cast on the receiving officer to accept the votes, and this might possibly be construed into a public duty. But even if this were so the offence was not to the public, but to the individual, and consequently the plaintiff was a party specially injured. But if the right to vote be considered as a right given only to a class

Ashby v. White
considered.

(1) It is important to notice the distinction of language used: in one case "receive an injury," in the other "are offended."

of the community, as in fact it was, then the case seems to fall within the principle which we must next consider.

The action for nominal damages is not taken away unless the right is vested in the entire community :

The cases in which the right of action for small damages is taken away are those only where the rights are vested in, or the duties relate to, the entire community. If they are only vested in, or relate to, a class, the action for nominal damages remains, because there is no remedy by indictment, and this whether the class be great or small.

e.g., right in inhabitants of a certain district.

Thus where the inhabitants of a district had a customary right to water from a spout, and a riparian owner on the supplying stream prevented the water reaching the spout, so that what remained was insufficient for the needs of the inhabitants ; some of the inhabitants sued, and although they had never suffered any actual personal inconvenience they were held entitled to recover nominal damages. Baron Channell laid down the true principle to be that " where an indictment may be maintained there is no remedy by action without proof of individual damage. But this does not apply where the injury complained of is not one affecting the public generally, but only a particular class or section of persons : " *Harrop v. Hirst* (1).

Action only taken away where indictment will lie.

L. R. 4 Ex:
43-
9 Co: 113a.

And it was thus laid down in *Mary's case* : " *Privatum damnum sive nocumentum* shall be reformed by the action of the private party grieved, and *commune nocumentum* at the suit of the King, who is the head of the whole commonwealth ; but a trespass done to many commoners is *privatum* and not *commune nocumentum*."

But when there is a *commune nocumentum* then the main principle applies: no action can be brought except by an individual who can "shew a particular damage suffered by himself over and above that suffered by all the Queen's sub-

(1) The judgments proceed evidently on the principle to which we have so frequently adverted, namely, that nominal damages may be recovered for the mere violation of a right, although the plaintiff has suffered no actual damage. But it is clear that the case falls within the abstraction of water cases already considered under the head of nominal damages ; and also resembles the commoner cases. It was admitted that the abstraction of the water was in appreciable quantities.

[ante, p. 133.]

jecta." (See, among many other old cases, *Fineux v. Hovenden*, Cro: Eliz: 664. and *Paine v. Partrich*.)

Carthew, 191.

In cases of obstructions to highways, it frequently therefore becomes a question whether the way is really a highway or one only for the convenience of a class; for example, the inhabitants of a certain parish. As in *Thrower's case*, where the distinction was taken by Hale, J., between the obstruction of "*communis via pedestris ad ecclesiam pro parochianis*, in which case an indictment would not be good, for there the nuisance would extend no further than the parishioners for which they have their particular suits," and a common footway to church which might lead further. (See also *Austin's case*.)

In cases of obstruction, examination necessary to see if there is really a highway.

1 Vent: 208.

1 Vent: 189.

The class of cases including actions by commoners for surcharge of common fall within this principle.

It is very important to see how this rule we have been discussing has been applied. It will be convenient to consider a few of the cases in groups, according to the nature of the public duty violated. In many cases it will be noticed that the question of remoteness of damage is involved.

Peculiar injuries resulting from obstructions to, or unlawful use of, highway.

A person who could only prove that he had been delayed on several occasions in passing along the road, and that he was obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or else to remove the obstruction, was held not entitled to bring an action: *Winterbottom v. Lord Derby*. But in *Chichester v. Lethbridge* the plaintiff recovered on account of having to travel a longer and more difficult road; and also in *Hart v. Bassett* on the same ground, £5 damages being awarded "for the labour and pains he was forced to take with his cattle and

Examples of peculiar injuries.

L. R. 2 Ex: 316. Willes, 71.

T. Jones, 156.

servants by reason of this obstruction (1). So where a man was delayed four hours by the obstruction, and was prevented from doing the journey as he was used to, so many times in the day, he was held entitled to succeed: *Greasly v. Codling*.
 2 Bing: 263. So where, owing to waggons standing too long in the street, the free passage of light and air was impeded, and the plaintiff had to burn gas all day, he recovered his loss: *Benjamin v. Storr*. Brett, J., suggested that where a highway was obstructed and another, though less convenient, way was provided, the plaintiff would fail to establish a case of peculiar injury.

A very extreme case was put by Lord Denman, C.J., in
 9 Q. B. 991. *Dobson v. Blackmore*: "If an obstruction of a public road appeared to be of a permanent nature in its construction, or professed, either by notice affixed or in any other way, to deny the public right, and so led to an opinion that no road was there, the value of a house might be lowered in public esteem, and pecuniary loss might follow, for which we will not say that an action would not lie."

Obstructions to navigable rivers.

The owner of barges was compelled to unload and carry his cargo round by a longer way: he recovered in respect of his
 4 M. & S. 101. pecuniary loss: *Rose v. Miles*.

So the verdict was for the plaintiff, who, being the owner of houses abutting on a river, was hindered by barges of his convenient access, and was obliged to have his goods conveyed
 9 Q. B. 991. to his house by a more circuitous route: *Dobson v. Blackmore*.

Nuisances from noxious vapours or smells.

Nuisances
 generally so
 called.
 11 H. L. ca:
 642.
 [ante, p. 159.]

This question was much discussed in the important case of *St. Helen's Smelting Co. v. Tipping*, in which the plaintiff

(1) The distinction taken by the Court of Exchequer between this case and *Winterbottom v. Lord Derby* was that in the former there was pecuniary loss, but in the latter there was none.

recovered substantial damages for injuries to his trees resulting from the adjacent smelting works: the question of personal discomfort from smells was also considered. The principle laid down was that an inhabitant of a district must submit to a certain amount of personal discomfort, according to the circumstances of every district: that is to say, what might be held to be a nuisance to an inhabitant of Sussex, might not be held to be a nuisance to an inhabitant of the Black Country; therefore, although the smell or vapour complained of were productive even of sensible personal discomfort, yet it would not be actionable unless it were very aggravated. But where the damage results to property the same rule does not apply, and therefore actual material injury to property will entitle the plaintiff to damages in respect of it.

A similar question arose in *Salvin v. North Brancepeth Co.* 22 W. R. 904. The plaintiff's scientific evidence seemed almost irresistible that damage to property would gradually ensue from vapours, and had in fact begun. But the defendant's evidence rebutted the present damage. The injunction which the plaintiff asked for was refused on the authority of the previous case: but it was pointed out that if any substantial damage could be shewn at any future time, the plaintiff would not be estopped from suing in respect of it.

These cases establish the following propositions:—

- (1) The injury must be peculiar to the plaintiff.
- (2) The injury must be the direct result of the act; the rules as to remoteness of damage applying.
- (3) The injury must be substantial, not fleeting nor evanescent.

General principles.

[Brett, J., in *Benjamin v. Storr*, L. R. 9, C. P. 40.]

In accordance with what we have already said in section 4 of this chapter, the plaintiff may claim technical special damages in respect of his special injury. As, for example, for obstructing the navigation of a river, the plaintiff's access to his house being taken away, he can recover general substantial damages for loss of custom, or technical special

Technical special damages may be laid and recovered.

5 M. & G. damages for the loss of particular customers. (See *Rose v.*
613.
4 M. & S. 101. *Groves*, and *Rose v. Miles*.)

Rule as to
abating
nuisance.

L. R. 2 Ex:
316.

16 Q. B. 276.

7 Q. B. 339.

The question remains whether the expense of removing an obstruction or nuisance can be recovered as damages as for a peculiar injury. In *Winterbottom v. Lord Derby* it was held that they could not be recovered. They certainly cannot be where the obstruction might have been passed with reasonable convenience: *Dimes v. Petley*. This general rule was acted on in *The Mayor of Colchester v. Brooke*. The facts were these. An oyster-bed in a navigable river reduced the waterway: the defendant's ship grounded and destroyed the bed. The action was brought by the obstructor. It was said that "each individual who is only injured as one of the public cannot abate the nuisance any more than he can sue: that with regard to a private nuisance, the individual may abate so as he commits no riot in doing it:" and that a public nuisance becoming a private one in respect of special injury, might be abated by the individual specially injured. In the case there was no special injury, and therefore, as the defendant was not entitled to abate the nuisance wilfully, it was held that he was bound to use care and skill in navigating the river; and the jury having negatived this, judgment was given for the plaintiff.

§ 6. REMOTENESS OF DAMAGE.

Remoteness
of damage.

The subject of remoteness of damage is a most complicated one; and to examine it fully by the light of the multitude of instances to be found in the Reports, would necessitate the devotion to it of a long chapter. The general subject we are dealing with does not seem to require this extended enquiry, but only one sufficient to extract the leading principles and most striking examples. The question is, is the damage suffered the direct consequence of the defendant's act, or is it a remote consequence; the consequence of a consequence?

"It were infinite," says Lord Bacon in his Maxims of the Law, "for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

Bacon's
maxim.

This maxim embodies the rule of law and the reason of the rule, which insists on the necessity for ascertaining the *causa proxima* of the wrong complained of, and prohibits the recovery of damages from any cause more remote. It is important at the outset to point out the distinction which, however slight it may be, exists between the application of this rule of *causa proxima* in cases of contract and tort.

Causa proxima
must be dis-
covered.

With regard to the former, the whole law seems to be summed up in the well-known case of *Hadley v. Baxendale*: "The injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract." One example of the application of this rule must be given to elucidate it. Tickets were taken from A. to B.: the train did not stop at B. but went on to C.: in consequence damages were claimed in respect of (i.) inconvenience from having to walk from C. to B.; and (ii.) expense for doctors from exposure to wet, the night having been rainy: *Hobbs v. London & South Western Ry. Co.* The Court allowed the first claim, but disallowed the second. Cockburn, C.J., after laying down the rule as given above, said that the damage must therefore be something immediately flowing out of the breach; something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. He then put two hypothetical cases. Suppose a passenger put out at a wrong station on a wet night, and being obliged to walk in the rain, he catches cold, is laid up with fever, and loses an employment; or whilst walking home he falls and breaks his leg. The conclusion was that in either case the

Rule in actions
on contract,
9 Ex: 341.

L. R. 10 Q. B.
111.

walk (or, rather, the getting) home alone being in the contemplation of the parties, in respect of that alone could damages be recovered.

is not strictly
applicable to
torts.

L. R. 7 C. P.
253.
Rule in torts.

With regard to torts the principle must of necessity be somewhat different, because there can only be one party whose contemplation can be material. The rule was laid down as follows by Bovill, C.J., in *Sharp v. Powell*: A tortfeasor is responsible for the ordinary consequences which are likely to result from his act; but, generally speaking he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. The defendant had committed a breach of the Police Act (21 & 22 Vict. c. 47, s. 54), by washing a van in the public street: the waste water ran towards a grating twenty-five yards away: the grating was choked up with ice: the water ran into the street and froze: the plaintiff's horse slipped and broke his leg. The Court held that the defendant could not reasonably expect the frozen accumulation at the grating (although there had been a fortnight's frost), and was therefore not liable.

2 W. Bl:
892.

Facts of the
squib case.

We must next consider the famous squib case (*Scott v. Shepherd*), in which the plaintiff was held liable (Blackstone, J., dissenting) for the consequences of his act under the following circumstances. "On the evening of the fair-day at Milborne Port, 28th October, 1770, the defendant (Shepherd) threw a lighted squib made of gunpowder, &c., from the street into the market-house: which lighted squib, so thrown by the defendant, fell upon the standing of one Yates: one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it across the said market-place, where it fell upon another standing there of one Ryal, who instantly, and to save his own goods from

being injured, took up the squib and threw it to another part of the market-house, and in so throwing it struck the plaintiff then in the said market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes." Shepherd's act was held to be the proximate cause of the plaintiff's injury.

Sneesby v. Lancashire and Yorkshire Ry. Co. is another example of the defendant being held liable for damage resulting after a long chain of circumstances. Beasts were being driven along an occupation road to the fields: they were crossing the level siding of the railway: some trucks were sent down the line negligently which frightened the cattle: the drovers recovered some of them, but the others went along the road, got into a garden through a defect in the fences, and so on to the line, where they were run over by a train and killed. Mr. Justice Blackburn in holding the Company liable said that so long as the want of control over the cattle remained without any fault of the owner, the *causa proxima* was that which caused the escape, for the consequences of which he who caused it was responsible. If control over the cattle was lost and could not be recovered until they had run into danger and were killed, the death was the natural consequence of the negligence.

We have in these two cases an extended chain of circumstances every link of which springs of itself out of the preceding one without the intervention of any new agency: each act generates the succeeding one, and so long as this freely generating process continues, the liability of the impelling agent continues. It is to be noticed that in the squib case it was not Yates, the owner of the standing, but Willis, a bystander, who picked up the explosive and threw it on: but the judges expressly rest their judgment on the *automatic* nature of the several acts. De Grey, C.J., said: "It has been urged that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity

L. R. 9 Q. B.
263.

In these cases every link of the chain springs directly from the preceding one.

In the squib case the acts were automatic.

for their own safety and self-preservation." The automatic nature of the successive acts being accepted as a test, the principle to be deduced cannot be better expressed than it was by Nares, J., in the maxim *Qui facit per aliud facit per se*.

It is important to see further whether, first, this maxim requires any and what limitation; secondly, if it is capable of any and what extension.

First, as to the necessary limitations.

[*ante*, p. 164.]
Distinction
between the
frost and the
squib cases :

A very similar chain of circumstances existed in *Sharp v. Powell*, just considered. But the distinction between the cases seems to be that a new *causa causans* arose, starting a fresh set of circumstances as to which it became itself the proximate cause: this new cause was the freezing and obstruction of the grating. It is therefore necessary to limit the proposition in the following way: directly the natural course of events is altered, impeded, accelerated, or in any other way affected by any other impelling agency, that agency becomes the *causa proxima*, and the natural consequences of the original impelling agency are held to cease.

but if original
actor knows
or ought to
know of new
cause, then he
is liable,

But this must again however be limited, in the language of Chief Justice Bovill, unless he who in point of fact sets in motion the whole train of circumstances, "knows or has reasonable means of knowing that by reason of this new cause the course of natural consequences is likely to be altered."

if as a reason-
able man he
should have
foreseen the
results.

Two things are therefore necessary to make him liable. He must know of the existence of the new cause; and in his capacity as a reasonable man he must foresee the natural or probable result of this new cause acting on the circumstances he has himself set in motion. Another very good instance of this is furnished by *Lawrence v. Jenkins*. The plaintiff had a prescriptive right to have certain fences kept in repair: they were out of repair, his cows got through into an adjoining field, then they fed on the leaves of a yew tree and were poisoned. The defendant was held liable. Here the yew tree was as clearly the *causa proxima* as the frozen grating in the former case: but it was not difficult to presume a knowledge

L. R. 8 Q. B.
274.

Example from
broken fence
and yew tree.

of its existence, and also of the consequences if cattle fed on its leaves : and therefore although the new cause acted on the chain of circumstances resulting from the broken fence, and sent them in a new direction ending in the death of the cows, yet by reason of this knowledge the defendant's liability still remained (1).

So also in *Smith v. London & South Western Ry. Co.*, where the facts were these : the company's servants having trimmed the hedges left the trimmings in small heaps along the bank : the weather was very hot, and a fire broke out in the heaps, spread to a stubble field, and was thence carried by a high wind over a road to the plaintiff's cottage, which was burnt down. There was some doubt how the fire originated, but there was ample evidence for the jury that it originated from sparks from a passing engine. Brett, J., in the Court below held that the defendants ought to have anticipated that sparks might be emitted from their engines : but that no reasonable man would have foreseen the disastrous consequences which did in fact occur. But the Exchequer Chamber, reversing the decision, held that this foresight of results is not the true test, and that if the defendant is guilty of negligence his liability cannot depend upon it. The only new cause in this case seems to be the high wind : if it were not for that it would resemble *Scott v. Shepherd* : but when the defendant's act occurred (which was in point of fact composed of two acts, the leaving the trimmings and the emission of the sparks) they must be taken to have been cognisant (by their servants) of the high wind, and the consequences from a spreading fire should then have been easily foreseen (2).

(1) There are numerous broken fence cases. In *Anon.* : "une equa of the plaintiff's went through the gap, and fell into a ditch and *submersa fuit*;" in *Powell v. Salisbury*, a haystack fell upon the horse; in *Lee v. Riley*, the defendant's horse got through the fence, the plaintiff's horse quarrelled with it and received a kick which led to his being killed. In all these cases the plaintiff recovered.

Ventr: 264.
2 Y. & J. 391.
18 C. B. N. S.
722.
[cf: p. 100.]

(2) Similarly in the *Balliffs of Romney Marsh v. Trinity House*, where the defendant's ship grounded on a sand bank through negligence and was driven by a high wind against a sea wall which it damaged : the owners of the ship were held liable.

L. R. 5 Ex:
204; 7 Ex:
247.

Where fresh
agent is a
human being.

We must now proceed to consider how far these principles have been extended where the new impelling agent, or *causa proxima*, has been a human being not, as in the squib-case, impelled to act in self-preservation nor automatically.

3 Q. B. D.
327.

This point and all the most important cases have been so exhaustively considered by Cockburn, C.J., in his judgment in *Clark v. Chambers*, that it is unnecessary to do more than notice a few of the most striking examples.

Examples.
5 M. & S. 198.

In *Dixon v. Bell* the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming; this the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home, and, thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable, "as by this want of care," said Lord Ellenborough—that is, by leaving the gun without drawing the charge or seeing that the priming had been properly removed—"the instrument was left in a state capable of doing mischief, and the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable."

1 Q. B. 29.

In *Lynch v. Nurdin* the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. The defendant was held liable.

L. R. 4 C. P.
274.

In *Collins v. Middle Level Commissioners* the defendants were bound under an Act of Parliament to construct a cut and culvert with proper walls, gates, and sluices to keep out the waters of a tidal river. In consequence of their defective construction the water flowed into the cut, and, bursting its bank, flooded the adjoining lands. The plaintiffs closed

the culvert to protect their lands: other landowners opened the culvert to protect their land, and so increased the overflow on the plaintiff's land. The Commissioners were held liable. Lastly, in *Clark v. Chambers* the defendant obstructed a carriage-way by placing *chevaux-de-frise* upon it: a passer-by removed it and put it on the footway; the plaintiff coming along on a dark night, ran against it and was injured; the Court held that he was entitled to a verdict.

3 Q. B. D.
327.

Now in all these cases, and many more closely resembling them, the actual cause of the damage was a human being not the original actor: and the key to the class of which they are typical is to be found in Lord Denman's judgment in *Lynch v. Nurdin*: "If I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first."

Reason of
liability.

1 Q. B. at p. 35.

This principle seems sufficiently to account for the decision in *Burrows v. March Gas Co.* The company had fixed in a house a gas-pipe which leaked: a gasfitter not in the employment of the owner of the house went near the pipe to examine it with a lighted candle, and an explosion took place, damaging the plaintiff's house and goods. It was clear that the proximate cause of the damage was the act of the gasfitter: the jury found that the company ought to have caused the pipe to have been tested by some competent person; consequently, not having done so, they must have been held to have foreseen the possibility of the accident happening. The opinions of the judges differed as to the true grounds of the decision, for the most part regarding it as a case of contract: Kelly, C.B., however, regarding the gasfitter and the company as joint tortfeasors.

L. R. 5 Ex:
67; 7 Ex: 96.

Thus it will be seen that the test of liability is practically the same, whether the disturbing cause in the chain of consequences is animate or inanimate: in either case it is, first, did the defendant know of the existence of the new cause, or ought he as a reasonable man to have foreseen that its existence was probable? and, secondly, ought he to have foreseen

as a reasonable man that its operation on the direct chain of consequences was also probable? (1)

It is essential to notice generally, first :—

Important
features of
liability.

Latch: 13.

The liability of the defendant depends primarily on his first act, which must have been wrongful at the outset: if it was not, the rule of law is well expressed by the old Norman French maxim, "Si home fait un loyal act, que apres devint illoyal, c est damnum sine injuriâ."

Secondly, his liability is not affected by the fact that the act of the second person (or human agent) is also a tort, so long of course as the case can be brought within the foregoing principles.

Thirdly, his liability is not, under certain circumstances, affected by the fact that the plaintiff himself was a trespasser.

Old rule
where act of
human agent
was a tort or
breach of con-
tract.

8 East, 1.
1 Sm: L. C.
553 [8th ed:]

With regard to the second proposition, it has not long been considered as entirely free from doubt. The leading case on remoteness of damage where the *causa proxima* is a human agent was always considered to be *Vicars v. Wilcocks*. It was an action for slander, the damage alleged being that the plaintiff had been dismissed from his master's service in consequence, before the end of his agreed term of service. Lord Ellenborough, C.J., said "the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence; a mere wrongful act of the master, for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression."

9 B. & S. 303.

(1) It must be confessed that *Hill v. New River Co.* carries this principle to a great length. A water company left a stream of water spouting up in the highway. The plaintiff's horses were frightened, swerved and fell into an unfenced excavation made by some contractors who were making a sewer. The water company and not the contractors were held liable. The question of knowledge of the excavation does not seem to have been discussed.

It is a little difficult to understand how the principle could ever have been accepted, for in all cases of defamation where actual damage has followed the words, the damage results from the act of a human agent, and in the majority of cases is a wrongful act on the part of this person.

This case was, however, finally disposed of by Lord Selborne, C., and Brett, L.J., in the Court of Appeal, in *Bowen v. Hall*: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person : or because such act so done by a third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact. If the doctrine of Lord Ellenborough in *Vicars v. Wilcocks* requires this doctrine for its support, it is in our opinion wrong."

The rule of remoteness is however applied in defamation cases where the words have been repeated by the person to whom they were first addressed. The original utterer is held

New rule agreeing with foregoing principle.
6 Q. B. D. 333.

1 Sm: L. C. 264 [8th ed.]

Repetition of slander,
[*post*, p. 312.]

within rule as
to remoteness.

not liable for the damage flowing from this repetition, unless the circumstances are such as point to the reasonableness of his foreseeing that they would be so repeated.

Where plain-
tiff is a tres-
passer.
(cf. p. 245.)

The third of the above propositions must be applied however with great care, and will not bear much extension. It must be read subject to the rules as to contributory negligence.

3 B. & Ad.
304.
Defendant
liable for
hidden mis-
chief unless
warning given.
4 Bing: 628.

In *Ilott v. Wilkes* the defendant was held not to be liable, because the plaintiff had notice that spring-guns were set in a particular wood, and he had voluntarily exposed himself to the danger; but in *Bird v. Holbrook*, another spring-gun case, the plaintiff recovered on account of the injuries sustained although he was undoubtedly a trespasser, there being no warning.

No liability
where act
complained of
is the plain-
tiff's,

But if the act was an independent act of the plaintiff, whether negligent or not, he will not be entitled to recover: in other words, the defendant is not liable if the disturbing cause in the chain of consequences is the plaintiff himself, as in *Glover v. London and South Western Ry. Co.*, where a passenger was assaulted by being wrongfully removed from a carriage, and in consequence left a pair of opera glasses behind him: it was held that the claim in respect of them must be struck out.

L. R. 3 Q. B.
25.

11 C. B: N. S.
142.

So in *Hoey v. Felton*, an action for false imprisonment: the plaintiff had been detained after two o'clock, and he alleged that if he had appeared at a certain factory by two o'clock he would have obtained employment, but that being unwell in consequence of the imprisonment, he went home, and did not go to the factory till the next morning, when some one else had been employed. The plaintiff was held not entitled to recover, because the loss arose from his own act in going home, as well as from the act of the third party in not engaging him.

1 Camp: 60.

In *Boyce v. Bayliffe*, the plaintiff having been assaulted and imprisoned on board a homeward-bound ship by the captain,

quitted her at the next port and paid £100 for his passage home by another ship. Lord Ellenborough, C.J., held that the imprisonment was not the *causa proxima* of the transshipment, for the plaintiff had of his own free will transhipped himself, and therefore could not recover the cost of doing so. An important qualification was introduced: "unless he were driven to it in order to redeem himself from any great peril or grievance." Where the plaintiff's act, therefore, is justified he may recover (1).

unless it be
justifiable.

In *Richardson v. Dunn* the plaintiff's act was held unjustifiable. R. desired to buy a public-house. D. said that B. had told him that the owner had said that the receipts were so much: on which the house was purchased and the receipts were found to be much less. An action by R. against the owner was dismissed. In his action against D. the costs of the first action were held to be too remote, because it was not the natural consequence of his representation that the owner should have been sued.

8 C. B. N. S.
655.

Suit
brought
against wrong
person not
justifiable:
therefore costs
cannot be re-
covered.

We have purposely left till the end a group of cases which deal with loss of business arising from obstructions, which do not go to the extent of entirely preventing access, because there still seems to be some uncertainty as to the law.

Loss of busi-
ness arising
from obstruc-
tions.

It will clear the ground to explain shortly how the discussion of the question has arisen: either the obstruction is unauthorized, in which case it is a public nuisance, and the plaintiff brings his action in respect of his peculiar injury: or it has been authorized, but has been continued beyond the time originally allowed, in which case it resembles the first case (as in *Wilkes v. Hungerford Market Co.*): or it has been authorized, and the plaintiff seeks compensation under the authorizing Act, in which case the same rules as to remoteness apply, unless there is anything in the Act limiting the liability to compensate.

[cf. p. 153.]

2 Bing: N. C.
281.

(1) Note the case of jumping from an omnibus when the horses were running away owing to negligent driving: *Jones v. Bence*. [Foot, p. 249.]

Ground of
decision in
compensation
cases.

The question having been discussed in compensation cases which turn on the construction of the words "injuriously affected," in the Lands Clauses Acts, it is important to notice in what way these two classes of cases are connected.

Criterion of
right to com-
pensation.

The criterion of right to compensation is this: "unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed" (Lord Campbell, C.J., *re Penny and South Eastern Ry. Co.*, approved by the House of Lords in many subsequent cases): at the same time "it does not follow that a party would have a right to compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment, but a right of action": Lord Cranworth, *Caledonian Ry. Co. v. Ogilvy*.

7 E. & B. 660.

2 Macq: H. L.
235.

Effect of com-
pensation,
decision on the
subject.

Therefore compensation cases which decide against a claim on the pure construction of the Acts do not touch our subject: but those which decide in favour of a claim, or against a claim on the ground that it would not have been actionable if the obstruction had been unauthorized, are of the highest value on this branch of the subject, so many of them having been decisions of the House of Lords.

No right to
compensation
for loss of cus-
tom (L. R. 2
H. L. 175.)

Reverting to the point before us, loss of custom arising from an obstruction, the decision of the House in *Ricket v. Metropolitan Ry. Co.* was that there could be no claim for compensation under the Lands and Railway Clauses Acts in respect of loss of custom. Lord Westbury dissented from the decision, but the majority, Lord Chelmsford and Lord Cranworth, considered the case clear, not only on this ground, but also (after reviewing and dissenting from the earlier decisions in *Baker v. Moore* and *Wilkes v. Hungerford Market Co.*) on the ground that there would have been no cause of action in respect of peculiar injury arising from the public nuisance, on account of the remoteness of damage.

cit: 1 Raym:
491.
2 Bing: N. C.
281.

In the Common Pleas, however, Brett, J., refused to accept *Ricket's case* as deciding anything more than that compensation

for loss of custom could not be recovered under the Acts (*Benjamin v. Storr*): and the question was again debated in the House of Lords in *Caledonian Ry. Co. v. Walker's Trustees*. It would be out of place here to go through the whole of the arguments and the elaborate review of all the previous cases; it will be sufficient to state the four propositions laid down by the House.

L. R. 9 C. P.
400.
7 App: Ca:
259.

(1.) When a right of action which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts.

General principles of right to compensation.

(2.) When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation.

(3.) Loss of trade or custom, by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation.

(4.) The obstruction by the execution of the work, of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation.

The true interpretation of *Ricket's Case*, therefore, is this: [ante, p. 174.] Loss of custom *by itself* being a purely *personal* right of action (even if it exist), has no reference to land, and is not the subject of compensation. Lord Chelmsford's own explanation in the subsequent case of *Metropolitan Board of Works v. McCarthy*, and Lord Selborne's explanation in the *Caledonian Ry. Co. v. Walker's Trustees*, therefore leaves the question still open whether the strictures passed upon the early cases in *Ricket's case* were justified; *Benjamin v. Storr* points to the conclusion that they were not, and this case was followed by Fry, J., in *Fritz v. Hobson*.

L. R. 7 H. L.
243.
7 App: Ca:
259.
But loss of custom may be recovered as damage.
L. R. 9 C. P.
400.
14 Ch: D. 542.

[*ante*, p. 162.]

It is important also to bear in mind that these are simply cases of obstructions interfering with the *convenience* of customers, and do not therefore go so far as *Rose v. Miles*, where the access was destroyed and customers *could not* come to the house. In such a case the above propositions warrant the statement that loss of custom, or loss of special customers, may be claimed for where the access to premises has been completely (either permanently or temporarily) cut off.

It seems possible to consider the narrower question by the light of the principles already laid down. It resolves itself perhaps into this: is the defendant liable because people have chosen to abstain from going to a shop on account of the difficulty of getting to it? It is doubtful even if it can be put so high as this: the result of the obstruction usually (certainly where it is an authorized one) is that people prefer of their own free will to pass on one side of a road rather than on the other: it may be said that this is the ordinary consequence, and one which, from its frequent occurrence, should be anticipated by the defendant as the result of his act, but is very doubtful whether the foregoing principles could be extended legitimately to such a case.

CHAPTER VI.

Of the Breach of Statutory Duties.

HITHERTO we have only considered rights and duties as they arise at common law: we now come to those which have their foundation in statutes. The general principles governing the subject are of course identical with those governing the common law rights, but they are complicated by the introduction of an entirely new element—the question of penalties.

Penalties introduced for the first time.

Both rights *in rem* and rights *in personam* are created by statute, giving rise to correlative duties: so also duties to the public and duties to individuals are laid upon persons by statute, giving rise in their turn to rights resembling those we have already considered.

It is almost a truism to say, but it is none the less important to remember, that these rights and duties, depending as they do for their existence upon statutes, the answers to the fundamental questions, Does the duty which is alleged to have been broken, exist? or, Has the right alleged to have been violated come into existence? can only be found in the statute, and must depend on an accurate interpretation of its words. The cases, some of which depend on private Acts of Parliament, are often difficult to follow without the exact words of the Act to guide the student: moreover in some cases where the Act is very long, a difficulty arises in understanding them, because the Court has not had its attention called to all the sections bearing on the question, and which may be scattered somewhat promiscuously through the Act.

The existence of the right or duty depends on accurate interpretation of the statute.

The all-important question arises, however, in respect of the penalty clauses. The penalties themselves are of two kinds: those which may be recovered by the Crown or a common

Penalties are of two kinds.

Variations in
penalty
clauses.

[*Ass't*, p. 200.]

informer, and those which may be recovered by the party aggrieved. Sometimes the Act imposes a penalty of the first kind, sometimes one of the second kind; sometimes it imposes both; and sometimes the penalty clauses are omitted altogether, the remedy in such a case being left to the common law. For the convenience of a study of the subject, we propose to divide the cases according as the statute on which they depend fall under one or the other of these heads, and to deduce therefrom general propositions applicable to the whole. The form which some of the most important of these propositions must take depends at the present time on the correct interpretation of one case only: *Atkinson v. Newcastle and Gateshead Waterworks Co.* The Court of Exchequer based its decision on precedent; but this judgment was overruled by the Court of Appeal, and the proposition laid down by Lord Cairns, C., seems to the author to overrule the whole mass of previous cases. In view of the fact, however, that the question has not yet been brought before the House of Lords, and that this proposition may possibly be there held to be too broad, it is proposed to consider the cases independently of this decision of the Court of Appeal, and afterwards to take that case by itself and shew its bearing on what was previously supposed to be the law.

§ 1. CASES UNDER STATUTES PROVIDING NO PENALTIES.

General principle, where there is a right by statute there is also a remedy under the statute.

The general remedy for violation of statutory duties was, until the form of the action ceased to be of its essence, an action on the case as specially provided by the Statute of Westminster, c. 24: a remedy by action on the case being given to all who were aggrieved by the neglect of any duty created by statute. And in Comyn's Digest, Title "Action upon Statute, F," it is laid down, that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

6 Mod: 27.

In the *Anonymous case*, argued before Holt, C.J., the prin-

ciple is applied to an action by a devisee under the Statute of Wills. "If money," said the learned judge, "be devised out of lands, sure the devisee may have debt against the owner of the land for the money, upon the statute of 32 Hen. 8, c. 1, of Wills: for wherever a statute enacts anything, or prohibits anything for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity; and the action must be against the terretenant." And again, in *Braithwaite v. Skinner*, on a similar state of facts, Maule, B., said: "When a statute gives a right, then, although in express terms it has not given a remedy, the remedy which by law is applicable to that right follows as an incident." So in *Mitchell v. Knott*, the Vice-Chancellor said: "Whenever an Act gives a right, it means to give a legal remedy, and not to put the party to the extraordinary remedy of a Court of Equity."

And this being so, it is not necessary, where the duty is relative, to prove damage: "Where the Act is for the benefit of an individual, it is not necessary to go through the circuitous form of proving how much he is injured: he is entitled to what the Legislature has given him" (Bowen, L.J., *Mayor of Devonport v. Plymouth Tramways Co.*).

Damage need not be proved in action under statute where duty is relative.

5 M. & W. 313.
1 Sim: 497.
52 L. T. 161.

First, as to rights *in rem*. A man who had brought sheep within forty yards of a market held under statute, and sold them there in order to evade tolls, was held to be liable for disturbance of the market in an action by the proprietor: *Bridgland v. Shapter*.

Rights *in rem*.

A right under charter is the same in its nature as a right under statute. It may be useful to refer to the recent important market cases: *Great Eastern Ry. Co. v. Goldsmid*; *A.-G. v. Horner*; *Horner v. Whitechapel Board of Works*.

5 M. & W. 375.

9 App: Ca: 927.
14 Q. B. D. 245.
51 L. T. 414.

The Act 6 & 7 Vict. c. 83, s. 8, provides for the indorse-

e.g., indorsements on cabman's license.

15 L. J: C. P.
18.
23 L. J: C. P.
1.

Right *in rem*
vested in a
large class.

[*ante*, p. 146.]

Rights *in per-*
sonam :

properly
called statu-
tory contracts.

7 App: Ca:
694.

1 Ex: 870.

ment of cabmen's licenses by a magistrate. A cabman was dismissed and his master wrote the cause of dismissal on the back of his license. It was held that the cabman had a right that no one but a magistrate should indorse the document, and the master was held liable in the action: *Hurrell v. Ellis*; *Rogers v. Macnamara*.

A right *in rem* may, as we have seen, be vested in a large number of people: each one of them having a right which no other member of the community may interfere with. For example, the right to exercise the franchise: as to which see *Ashby v. White*.

Secondly, as to rights *in personam*.

These rights frequently arise by virtue of local or private Acts of Parliament: for example, a railway is seeking for compulsory powers, a landowner withdraws his opposition in consequence of a clause being inserted providing that certain works shall be erected and maintained to protect his property; or he succeeds in getting such a clause inserted in the enabling Act. These clauses, however, are in the nature of contracts and a disobedience to their provisions are breaches of contracts, rather than torts. This principle was laid down by Lord Watson in the *Countess of Rothes v. The Kirkcaldy Water Commissioners*: "Such statutory provisions occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement or forced upon them by the legislature."

In *Chamberlaine v. Chester and Birkenhead Ry. Co.*, the Act enabling the railway to be made, prohibited the construction of a certain part of the projected line, which would have interfered with a ferry, until certain other things had been done. It was clear from the wording of the Act that this clause was put in for the protection of the owner of the ferry, and that he had a right against the company to have the terms of this protecting clause carried out. The company, notwithstanding, made the line to the ferry before the other things had

been done. The judgment on the demurrer, however, was for the defendant, because, although the private duty was evident, the breach of it was not clearly made out.

So it was held in *Mayor of Devonport v. Plymouth Tramways Co.*, that a provision in the Act that part of the tramways were not to be opened until the whole system was completed, without the consent of two Corporations interested, was for the benefit of each of the Corporations, either of which could apply for an injunction to prevent a breach of the statutory duty towards them. 52 L. T. 161.

Third parties may acquire rights under such a statute, a duty being imposed towards persons not parties thereto ; as in *Hilcoat v. Archbishops of Canterbury and York*, where there was a sale of ecclesiastical lands to a railway. The archbishops were to agree as to the amount of compensation, and to pay thereout to the owner the value of a portion of the lands which was only ecclesiastical temporarily. They constituted themselves the arbitrators and fixed a value, but the plaintiff was held entitled to compensation in the usual way, *i.e.*, by a jury. Third party may acquire rights under them. 10 C. B. 327.

In public general statutes the element of contract of course entirely disappears. It is very rare that we find public statutes conferring rights either *in rem* or *in personam* on certain persons by name ; they either confer rights on a certain class of people, authors for example ; or else they lay certain duties on persons, specifying distinctly the class of persons towards whom these duties are to be exercised. As the class is specified it is clear these duties are not what are called "public duties," because they are not to be exercised towards the public generally, but only towards a certain class, more or less determined, of the public ; they may, therefore, properly be called "private duties," or more accurately "relative duties," the class towards whom they are exercisable obtaining by virtue of the statute correlative rights ; as, for example, the duty to fence mill wheels and machinery in places where women and children are likely to be at work. Nature of rights conferred by public general statutes.

Examples.

A duty was imposed on railways by statute to carry mails and postmen. The plaintiff, a postman, was injured, and it was held that he had a right to be carried, and consequently to be carried safely, and that he was entitled to recover, "not from any contract with the defendants, but from the duty imposed on them by statute": *Collett v. London and North Western Ry. Co.*

16 Q. B. 984.

Passengers' communication cords.

The Regulation of Railways Act, 1868, required means of communication to be provided for passengers. An accident happened, and damage which had been suffered by the plaintiff was traceable to the absence of communication: he was held entitled to recover: *Blamires v. Lancashire and Yorkshire Ry. Co.*

L. R. 8 Ex: 283.

Registration of transfers. Action by transferee for refusal;

Under the Companies Clauses, 1845, a company was bound to register transfers of shares. Owing to a refusal to or delay in registering, the transferee of shares suffered a loss: it was held that he had a clear right to have the transfer registered, and that the company must make good his loss: *Catchpole v. Ambergate Ry. Co.*

1 E. & B. 111.

by transferor.
14 Q. B. D.
882.

So also the transferor may sue the company, and he is at least entitled to nominal damages. In *Skinner v. City of London Insurance Co.*, the company refused to register, alleging a claim against the transferee, which afterwards proved to be unfounded. The plaintiff claimed the difference of the market price of the shares, the contract between him and the purchaser being that his account should be credited with the market value of the shares at the time of registration. The damage was held to be too remote because the company had no notice of the contract.

Railway fence cases.

Under this head may also be taken that well-known group of railway cases arising out of accidents due to the defective state of the companies' fences.

By the Railway Clauses Act, 1845, s. 68, the railway company is required to

"make and at all times thereafter maintain the following works for the accommodation of the owner and occupier of lands adjoining

the railway Sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass or the cattle of the owners or the occupiers thereof from straying thereout, by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be."

The principle has been uniformly laid down that this is a duty laid on the railway companies only with respect to neighbouring occupiers, and that they, and they only, have any corresponding rights: consequently that the right to recover against the company for damage resulting to cattle straying on to the railway only belongs to the owner of the field whose fences are out of repair, or to any legal occupier; that is, a tenant or licensee of the owner.

Duty is towards neighbouring land-owners only.

Therefore, in *Buxton v. North Eastern Ry. Co.*, where an accident happened owing to a train having run over an animal which had strayed on to the line through the company's defective fences, it was held that the obligation to fence was not imposed on the company with regard to passengers, and therefore in such a case it did not follow that an injured passenger would have a claim; any claim that he might have would depend on his right at common law, and the answer of the jury to the question whether the company had taken reasonable care that cattle should not stray upon their line.

L. R. 3 Q. B. 549.

And so where A.'s fences were out of repair, and his sheep trespassed on to B.'s field; B.'s railway fences being also out of repair, the sheep got on to the line and were run over. It was held that A. could not recover, for, as his sheep were trespassing, he was not a legal occupier of the field: *Ricketts v. East and West India Docks Co.*

12 C. B. 160.

And the duty is not only limited to the adjoining land-owners, but strictly to each one individually.

We shall see in another case that the purview of the Act is to be kept carefully in sight; it may possibly, therefore, be

[cf: *Gorris v. Scott*, *post*, p. 195.]

held that the word "cattle" may be strictly interpreted. And it is to be also noticed that the loss to the owner contemplated is to occur from their "straying thereout," so that their being run over by a passing train is not an essential ingredient in the action.

Principle extended to highways.

The principle of the "neighbouring landowner" has been extended to cases where the highway runs alongside the railway: but in such a case, if damage occurs to cattle straying through broken fences, the owner must have been using the highway "lawfully." The question in this form being in reality the same as "Were the cattle those of the owners or occupiers of the adjoining land?" Therefore where the cattle, without fault of their owner, strayed on to the public road and thence on to the railway and were killed, the company was held not liable (*Manchester, Sheffield and Lincolnshire Ry. Co. v. Wallis*): but where the cattle having strayed and having been caught were being driven home along the highway by the plaintiff's servants, the railway was held liable: *Midland Ry. Co. v. Daykin*. (This principle of lawful use of a highway is an old one, and is to be found in *Doraston v. Payne*.)

14 C. B. 213. Applying the same rule, in *Roberts v. Great Western Ry. Co.* cattle in going from the train to the highway had to pass through the station-yard: it was unfenced and they were run over: the company were held not liable.

17 C. B. 126.

2 H. Bl: 527.

4 C. B: N. S. 506.

The level-crossing cases will be found later on page 191, there being a penalty provided by statute.

Company cases.

There is a class of company cases, in which contracts have not been set out in the prospectus, which would seem to fall within this division; but in *Cornell v. Hay*, Honyman, J., said there was no statutory duty to set them out. The rule is that if they are not set out, the prospectus will be deemed fraudulent as between the company and shareholders.

L. R. 8 C. P. 328.

Public duties.

We come now to those duties laid by statute on certain people, not in respect of a certain class of the community, but in respect of the public generally; those duties which are strictly

called "public duties," or frequently absolute duties, correlating to which it is said there are no rights. This position we have [ante, p. 156.] already examined in the chapter on Damage.

We have already considered the principles of the law with regard to breaches of public duties at common law as to the necessity for special damage: there seems to be no reason why the same principles should not apply to breaches of statutory public duties: and, in fact, in a case already mentioned (*Chamberlaine v. Chester and Birkenhead Ry. Co.*), Pollock, C.B., 1 Ex: 870. expressly lays down this to be the law: "Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the particular act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage."

Among the numerous examples of the application of this principle the following may be noted.

Coe v. Wise. The Drainage Commissioners had to make and maintain a cut and sluice: they did not maintain it, it broke and damage ensued, for which they were held liable, irrespective of the provisions of sect. 217 of the Drainage Act, as to the method of assessing damages for acts done by the Commissioners; this being held to refer only to authorised acts, and not to breaches of the statutory duty. L. R. 1 Q. B. 711.

So in *Geddis v. Bann Reservoir Proprietors*, where the duty was to maintain a reservoir, from which water escaped; *Ruck v. Williams*, where it was held that a duty had been imposed on the Commissioners of Sewers for the district to put flaps to a certain sewer at its junctions with house drains; and *Brownlow v. Metropolitan Board of Works*, where the permission of the Admiralty had to be obtained before piles could 3 App: Ca: 430.
3 H. & N. 308.
13 C. B: N. S. 768.

be driven in certain parts of the Thames: piles were driven in without this permission; an accident occurred in consequence, and the Board was held liable.

9 Ch. D. 503.

Again, in *Nitro-Phosphate Co. v. London and St. Katharine Docks*, there was a statutory direction that the banks of the docks were to be four feet above Trinity high-water mark, and that the walls were to be maintained at that height. The walls were not of the required height, and during an extraordinary high tide the plaintiff's land was submerged and considerably damaged. The defendants were held liable: but an important principle of damages was laid down. The extraordinary high tide, although an act of God, did not excuse them entirely from liability; nor, on the other hand, were they liable for the whole damage caused; the damage caused had to be severed, so much being attributable to the walls not being the required height, and so much to the rising of the water above that height.

L. R. 4 Q. B. 138.

L. R. 9 C. P. 316.

11 Ex: 361.

On the other hand, in *Hyams v. Webster*, *Hammond v. St. Pancras Vestry*, and *Metcalf v. Hetherington*, the plaintiff failed although specially damaged, because he failed in establishing the existence of the duty. This, as we have said, can only be ascertained by a careful perusal of the words of the statute, and very frequently turns, more especially in Acts empowering certain works to be constructed, on the presence of the word "maintain." It may also turn on what the Court considers a reasonable interpretation of words used: thus, in the second case, the duty of a vestry "to properly cleanse a sewer" was held to mean a duty "to exercise due and reasonable care in cleansing."

Injunctions to compel performance of duty.

L. R. 3 Ch. 100.

There are a few special points connected with this subject which must not be passed over. Where the statutory duty is clearly established, a mandatory injunction will be granted to compel the duty to be performed, or to restrain the duty being exceeded: *A.-G. v. Mid-Kent Ry. Co.* But if it is absolutely impossible to perform it, e.g., a duty on a railway to make a bridge over a highway, and the funds of the company are entirely exhausted, the mandamus will be refused:

3 Q. B. D. 10. *re Bristol Ry. Co.*

So also where the statutory duty is clearly established, and the per-

formance of it is refused, a person who performs the duty may sue for the cost of doing it: *Holborn Guardians v. St. Leonards Vestry*; where the vestry refused to remove filth which they were bound to do: the guardians recovered the cost of removing it. But notice to the person whose duty it is to do the act is necessary; as in the case of maintenance of a bridge over a railway in proper repair. Thus the defendant had no means of ascertaining the defects, the company saw them, and without notice repaired the bridge: it was held they could not recover the cost: *London and South Western Ry. Co. v. Flower*.

Person who performs it (2 Q. B. D. 145.) may sue person who ought to have performed it.

1 C. P. D. 77.

There would seem also to be no difference between common law and statutory public duties as to the remedy by indictment for the breach (Lord Campbell, C.J., in *Couch v. Steel*). In *Reg. v. Scott* a railway company was indicted for and found guilty of obstructing a highway (before the Railway Clauses Act, 1845, imposed a penalty) beyond the powers of their Act. Another remedy for non-performance of statutory duties is by information filed by the Attorney-General.

Remedy for breach by indictment. 3 E. & B. 402. 3 E. & B. 543.

There is another class of cases which falls properly within this branch of the subject: actions against public officers for dereliction of their duty. There is a well-known distinction between officers who have to perform judicial, and those who have to perform ministerial duties. In actions against the former it is essential to shew malice, while in actions against the latter it is sufficient to shew that the duty has been badly performed; in both cases, of course, particular injury to the individual must be shewn.

Breach of duty by public officers.

The duties laid on these officers are almost without exception to be derived from statutes, and it is not difficult to see how this rule entirely agrees with those which have preceded it. Where a duty of purely a judicial nature is accepted by a person, that duty is to act honestly and uprightly, and to exercise his discretion to the best of his judgment: *Cullen v. Morris*; however erroneous the exercise of that discretion may have been, it is obvious that there has been no breach of duty unless there has been a dishonest act, a wilful perversion of judgment, or, in other words, unless malice can be shewn. But on the other hand, where the function is simply ministerial, the duty laid on the person accepting the office is to

Distinction between judicial and ministerial officers.

2 Stark: 577.

do the act prescribed and no other; therefore the failure to do the act in question, though not actuated by malice, is a breach of the statutory duty: *Barry v. Arnaud*.

10 A. & E.
646.
6 T. R. 646.

Thus in *Schinotti v. Bumsted*, a case under the old Lottery Act (33 Geo. 3, c. 62), it was held that the managers of lottery were purely ministerial officers, and having done their work badly, were liable.

L. R. 8 C. P.
489.

The question was much discussed in a recent case, *Pickering v. James*; which was an action against the presiding officer of a municipal election for contravention of the duties laid upon him by the Ballot Act, 1872. [There was a penalty provided by sect. 11 for any *wilful* neglect of duty: and to this question we shall have to revert in another section.] There were three duties: *i.* To deliver marked papers to the voters; *ii.* To be present at the polling station to take papers from the voters; *iii.* To ascertain that every paper was properly marked before it was put in the box: none of these duties had been performed: the plaintiff lost the election. With regard to the first two, the Court held that no connection had been established between the voters who had given in unmarked papers and those whose votes had been struck out, nor that the result would have been changed if these papers had been regular; therefore on these points the plaintiff's case failed. But with regard to the third, this necessary connection had been shewn, and that the election had been lost thereby; the Court held that it was a positive ministerial duty, that it was not necessary to shew malice or negligence, and that, irrespective of the remedy under sect. 11, the plaintiff was entitled to recover.

As in the previous instances, the statute will always be strictly interpreted to ascertain what the nature of the duty imposed really is. Thus in *Robinson v. Gell*, the clerk of a county court had omitted to prepare, or had negligently prepared, a notice of the judgment of the Court in accordance with the County Court Rules, whereby the defendant was misled as to the time of paying instalments, and had had his goods seized in execution. The Court held that there was no

12 C. B. 191.

statutory duty ; but that the rules were merely practical directions to guide the officers of the Court in the performance of their statutory duties.

In *Ashby v. White* the returning officer at elections was held to have simply ministerial duties to perform ; this followed not only from the construction of the terms of the appointment, but also from the fact that the right to vote existed independently of the duty to receive the votes, and therefore a refusal to receive a vote was a violation of the citizen's right *in rem*.

1 Sm: L. C.
264 [8th ed.]

These rules as to public ministerial officers must not be confused with those applicable to servants who have ministerial duties to perform for their master, which have already been considered on page 75.

§ 2. CASES UNDER STATUTES PROVIDING ONLY A CROWN OR
COMMON INFORMER'S PENALTY.

In many statutes giving rights or creating duties there is at the same time provided a penalty for the breach ; and "where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of the party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain suit for it" (Earl Selborne, C., *Bradlaugh v. Clarke*).

8 App: Ca: at
p. 358.

It may be taken as an almost invariable rule that the Crown penalty, when it stands by itself, is given in statutes creating public duties, and takes the place of the indictment for breach of common law public duties. It is also to be found in statutes creating private rights coupled with another penalty to the party aggrieved. It would in such cases seem to be given in respect of the breach of the general duty of obedience to statutes whatever their nature. The Crown penalty is however not unfrequently given, entirely or in part, to a common informer, either as representing the public, or as a reward for calling attention to the breach of the statutory duty : and

the onus is on him to shew that the statute has conferred the right of action upon him. The penalty to the party aggrieved is never given to a common informer: he only shares the Crown penalty. We shall always, therefore, use the term Crown penalty. The method of recovering this penalty is usually also provided in the statute.

Effect of imposition of Crown penalty.

We have now to consider how this penalty affects the results already arrived at. We have been unable to find any instance of a statute creating a right *in rem* and giving only a Crown penalty. In such statutes a penalty to the party aggrieved is often given alone, but it is more usual to find both kinds of penalty given. Where duties, however, are created, whether relative or absolute, it is not unusual to find the Crown penalty standing by itself.

Breach of duty sometimes made a misdemeanor.

The statute sometimes declares that for the neglect of the duty, the party on whom it is imposed shall be guilty of a misdemeanor.

Partyspecially injured may sue where duty is public.

The first question to be considered is whether, where the statutory duty is a public duty, a party specially injured may bring an action irrespective of the penalty, or although a punishment for the misdemeanor has been provided. The action has invariably been held to be maintainable.

4 B. & S. 361.

In *Hartnall v. Ryde Commissioners*, the duty of repairing the highways was cast upon the commissioners by the Ryde Act, which incorporated the Towns Improvement Act, 1847, by sect. 49 of which neglect to repair highway was made a misdemeanor. The highway was not repaired, and the plaintiff was thereby injured: having thus been specially damaged, the Court held he was entitled to recover (1).

7 H. & N. 760; 2 H. & C. 197.

Liability for repair of highways.

(1) There is a class of cases of which *Young v. Davis* is the type which must be carefully distinguished from the above case. The surveyor of highways has never been held liable for damage arising from non-repair. His duty is specially created by the Act, and is to the parish which employs him, and not to the public; a penalty being provided for the breach. The duty to the public of repairing the highways is cast on the parish, and not on the surveyor; and the Act does not impose a liability on the servant for a mere neglect of his employer's duty. This question as to the area of the duty resembles that discussed in *Langridge v. Levy*, as to the area of the duty imposed by contracts.

[*post*, p. 230.]

The question was discussed by Chief Justice De Grey in 1773, in *Rowning v. Goodchild*. The action was brought for damages against a deputy postmaster for breach of his duty, in not delivering a letter as required by 9 Anne, c. 10, there being a Crown penalty provided by sect. 40. The learned Chief Justice, in answer to the objection that the plaintiff should have proceeded for the penalty, said: "But if the action lies at common law" (that is, supposing the duty to have depended on the common law instead of on the statute), "as we think it does, the penalty is only an accumulative sanction."

2 W. Bl: 906.

The Crown penalty is a cumulative sanction.

In *Fawcett v. York and North Midland Ry. Co.* the plaintiff's horses had strayed from a field to the highway through the railway company's open gates at a level crossing on to the line, and so were killed by a passing train. It will be remembered in another class of railway cases, that a lawful use of the highway was held necessary to entitle the plaintiff to recover owing to the manner in which the duty to fence was imposed. In the case of level crossings, however, it was held in this case that under 5 & 6 Vict. c. 58, s. 9, the duty to keep the gates closed was an absolute duty, even as against stray cattle; there was, moreover, a penalty imposed for keeping the gates open under a previous statute (2 & 3 Vict. c. 45): the company were nevertheless held liable for the damage (1).

16 Q. B. 610.

Level-crossing case.

[*ante*, p. 184.]

In *General Steam Navigation Co. v. Morrison*, an action for special damage was brought against the owner of a ship for not complying with the Admiralty regulations. There was a penalty imposed for the offence of non-compliance; but it was directed against the owner only "if it appear that he was in fault," otherwise it was to be paid by the person in charge: on this ground judgment was given for the defendant. The action had evidently been brought against the wrong person. Williams, J., in his judgment expressed the opinion, which

13 C. B. 581.

(1) Level crossings over highways by private railways are not required by statute to be fenced: the obligation, if any, flows from the arrangement, or absence of arrangement, between the owner of the line and the road trustees: *Watson v. Baird*.

3 App: Ca: 1082.

had been agreed to both by the Court and the counsel during the argument, that "If it could have been established, by a reference to any of the provisions of the statute, that the defendant (the owner) had been guilty of a breach of duty in not complying with the regulations, so as to make him criminally responsible, this declaration would have been well founded." There is also a similar expression of opinion in *Gorris v. Scott*, to be noticed presently.

L. R. 9 Ex:
125.

[*post*, p. 195.]

General principle, action for damages for special injury will lie.

The Crown penalty stands in lieu of the indictment.

13 C. B. at
p. 589.

These cases seem satisfactorily to establish this point: that where there is a public duty, a breach being punishable by indictment or by penalty, as the case may be, an action may be maintained for a peculiar injury to the individual.

We therefore are justified in saying that where a penalty is imposed for the breach of a statutory public duty, it stands in the place of, or corresponds with, the ordinary remedy by indictment for breach of a common law public duty. That is to say, in the words of Creswell, J., in the last case: "The offence *per se* is visitable with the penalty; no action will lie for that offence; but one will lie in consequence of the special damage resulting from the offence."

1 Ex: D. 269.

Private duty with Crown penalty.

In the next case, *Ross v. Rugge Price*, we have an example of a relative duty created by a statute which also imposed a Crown penalty for the breach of it. The question arose under the Forest of Dean Act, and the rules made thereunder for regulating the use of adjoining mines; the penalty for breach was forfeiture of the gale by the offending galee to the Crown. The rules were broken by a galee, and his neighbour having suffered damage, it was held that his right of action was not taken away. Amphlett, B., thus enunciated the law: "Unless you find some remedy given in the statute where a benefit is given to an individual, or find in that statute clearly that it was not intended to give him any such remedy, the law then implies that he may have his common law remedy."

5 E. & B. 856.

5 E. & B. 849.

L. R. 7 Ex:
130.

So in *Joel v. Shepherd*, *Caswell v. Morton*, and *Britton v. Great Western Cotton Co.*, where the statute had provided a duty on

mill-owners to fence mill gearing in places where women and children were likely to go; the owners were held liable for injuries which had occurred owing to the want of fences. Here there was a relative duty to a certain class of work-people. This group of cases is important on two grounds. First, the statute (7 & 8 Vict. c. 15) provided that actions might be brought by inspectors under the authority of the Secretary for State in the name of any person injured: it was held that this did not take away the right of the party injured to sue for damages in person; secondly, there was a penalty imposed for breach of the duty, which might go to the party injured *at the discretion* of the Secretary for State. The full Court held that this did not preclude the party injured from suing; that is to say, that although the Crown might ultimately hand over its penalty to the person injured, yet that provision did not alter its character, and it was still a Crown penalty, and not one to the party aggrieved. This was assumed in all the other cases which have arisen (1).

Mill-fencing
cases.

Where there are statutory private or relative duties, the duty imposed is in reality twofold: *i.* the duty to the State of obedience to the statute; *ii.* the duty to the persons for whose benefit the statute is passed. A breach of the duty is therefore also twofold: to the first part the Crown penalty attaches; to the second, the ordinary action for damages.

Duty is twofold: to the State, and to the party to whom the duty is owed.

Therefore, in this case also, the offence *per se* is visitable with the penalty, and for the violation of the right the owner of it has his right of action for damages subject to the ordinary rules.

[67: p. 192.]
The breach *per se* being visited with the penalty.

(1) There is another principle in this case which must not be lost sight of. In the Forest of Dean Act there is an express remedy given *for enforcing the rules*. It was held that the principle, to which we shall hereafter refer, that where a remedy is given by the statute, that remedy can be alone pursued, did not apply: the remedy given here was only for enforcing the rules, and could not be said to take away or be substituted for the right to recover past damages which had arisen in consequence of the violation of the rule. This principle is also recognised by Bowen, L.J., in *Mayor of Devonport v. Plymouth Tramways Co.*, with regard to the powers given under the Act therein question to the Board of Trade.

[*Post*, p. 196.]

52 L. T. 161.

Couch v. Steel
considered.
3 E. & B. 402.

[*post*, p. 200.]

[*cf.* p. 158,
where this posi-
tion is con-
sidered.]

We have purposely reserved the full consideration of *Couch v. Steel* till after the principles were established from other cases, because the principle on which it proceeded was expressly questioned in the *Newcastle Water case*. The Merchant Shipping Act of 1844 required that every ship should "have and keep constantly on board a sufficient supply of medicines and medicaments suitable to accidents and diseases arising on sea-voyages, in accordance with a scale, &c." In case of default the owner was to incur a penalty of £20 for each offence, to be divided between the informer and the Seamen's Hospital Society. B., a seaman on A.'s ship, fell sick; A. had not provided the necessary medicines, and B. suffered an aggravation of his illness in consequence of this breach of the statutory duty. It seems to have been assumed that the duty was an absolute or public duty, that there were therefore no corresponding rights in the sailors to have the medicines on board, although the Court spoke of the enactment as one providing a benefit for the seamen; it was therefore treated as a case of the first of the above classes, the plaintiff claiming by reason of special injury (1). Lord Campbell, C.J., laid down this general proposition: that whenever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed: that the right to maintain an action in respect of special damage resulting from the breach

(1) It must be remembered that the Court of Appeal quarrelled chiefly with Lord Campbell's principle: although grave doubts were also expressed as to whether the case had been rightly decided under the Act.

7 H. & N. 760.

It certainly seems arguable that the duty laid on shipowners by the statute was a relative duty and not an absolute duty; and that it was a duty towards a certain and determinate class, i.e., persons on board; and so Martin, B., considered it in his judgment in *Young v. Davis*. This point would be clearer should any questions arise with reference to another duty, laid down by the same section, namely, "that of having on board a sufficient quantity of lime or lemon juice, &c., to be served out to the crew whenever they shall have been consuming salt provisions for ten days:" and in default of serving out, the master to incur a penalty, to be divided as before. These duties are much the same under the Merchant Shipping Act of 1867, 30 & 31 Vict. c. 124, s. 4.

of a public duty is a common law right (independent of whether the duty is created by the common law or by a statute): and that this right cannot possibly be taken away except by express words: and that it is certainly not taken away by the fact that a penalty is affixed for the breach of the duty which may be recovered by a person who has suffered no injury, *i.e.*, by a common informer. This does not differ from the rule which we have already arrived at.

One other case must be noticed which was decided on principles peculiar to itself: *Gorris v. Scott*. Under the Contagious Diseases (Animals) Act, 1869, the Privy Council made certain regulations to prevent overcrowding of cattle on board ship, the object being to check the spread of disease; in consequence of these regulations being disobeyed, the plaintiff's animals were *washed overboard*. There was a penalty—half to the Crown, half to the informer. Kelly, C.B., held that the plaintiff could not recover because the damage complained of was something totally apart from the object of the Act. It seems to have been assumed that if the cattle had suffered from overcrowding he would have had a good cause of action.

Example of
examination
into purview
of the Act.
L. R. 9 Ex:
125.

This case resembles those under the first division, in which it was held that the statute must be strictly construed to ascertain the nature of the duty.

The results arrived at under this division are therefore as follow (always remembering that *Atkinson's case* has still to be discussed):—When a Crown penalty or an indictment is provided for the breach of a statutory duty, if the duty is a relative one towards certain determinate persons (*i.e.*, a private duty), an action for damages will lie according to the usual rules; if it is a public duty, there is a remedy for the breach by indictment or for the recovery of the penalty, as the case may be, and also an action for damages if the plaintiff can prove that he has been specially damaged.

General re-
sults of § 2.
[*post*, p. 200.]

§ 3. CASES UNDER STATUTES PROVIDING A PENALTY TO THE PARTY AGGRIEVED, EITHER ALONE OR COUPLED WITH A CROWN OR COMMON INFORMER'S PENALTY.

We now come to those statutes in which a penalty is attached to the breach of the statutory duty, which is to go to the party aggrieved, and which either stands by itself, or is coupled with the Crown penalty discussed in the last section.

Penalty to party aggrieved is always in lieu of his action.

With reference to these penalties there is first to be noted a general proposition: that if a remedy is given by a statute to a person grieved by the breach of a statutory duty, that remedy stands in the place of his right to bring an action for damages at common law (1).

Rights *in rem*: e.g., copy and patent right.

Taking rights *in rem* first, we have examples in the ordinary cases of infringement of copyright and patent right. Both are (with slight exceptions) governed by statutes; in most of the statutes a penalty or remedy is given to the party aggrieved, and in many of them, as, for example, in the case of importation of pirated works for sale or hire, a common informer's penalty is also given. The forms of the penalty to the party aggrieved vary considerably. In the case of engravings under 8 Geo. 2, c. 13, the pirated plates and prints are to be forfeited to the proprietor, "who shall forthwith destroy and damask the same"; a poor consolation to the injured man, more especially as the pecuniary penalty of 5*s.* for every print used to be divided between the Crown and the common informer. This peculiar injustice was remedied by 17 Geo. 3, c. 57, which restored to the proprietor his action on the case for damages. In the case of the performing right

1 B. & Ad:
847.

(1) *Doe d. Bishop of Rochester v. Bridges* is usually cited as the authority for this proposition. The rule laid down in the case is as follows: "Where an act creates an obligation, and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner." This seems to relate only to enforcing the performance of the obligation, and not to the recovery of damages for the breach of it: as to the difference, see the *Forest of Dean case*. There is no doubt, however, as to the soundness of the proposition in the text.

[*ante*, p. 190.]

of drama or music, the penalty is fixed by 3 & 4 Will. 4, c. 15, at not less than £2 for every performance, *or* the full benefit arising from the performance, *or* the injury or loss sustained to the plaintiff therefrom, whichever shall be the greater damages, together with double costs of suit, to go to the author or proprietor.

Under the Patent Act, 1883 (46 & 47 Vict. c. 57), ss. 58 and 59, the penalty for infringement of designs is to be not more than £50 to the registered proprietor, to be recovered as a simple contract debt; and notwithstanding the penalty, he may, if he elect to do so, bring an action for damages.

The somewhat intricate question as to what constitutes an infringement of the rights under these statutes does not come within the province of this work, but will be found fully discussed in the text-books dealing with the subject.

The examples of the different penalties which we have given are, however, sufficient to illustrate the object of the legislature in fixing the limit where it is possible, or at least the measure of the damages recoverable by the party aggrieved. One consideration we shall find not unfrequently depends on the station of the person on whom the duty is cast, and a penalty smaller perhaps than the damage actually sustained is given to the party aggrieved on this account.

[*cf. Wright v. London Omnibus Co., post, p. 198.*]

In the next two cases we have instances of the violation of a relative duty and breach of its correlative right.

Relative duties.

In *Vallance v. Falle* the question arose under sect. 172 of the Merchant Shipping Act, 1854, by which it is provided that on discharge of a seaman the master of the ship is to give him a certificate of discharge. A penalty of £10 is affixed for the refusal; "the whole or part to go to compensate the seaman if he has suffered damage, or to the payment of expenses, or to the Crown." The plaintiff, although he had suffered more damage than £10 would compensate him for, was held not entitled to recover more. There can be very little doubt that this was not a Crown penalty purely.

13 Q. B. D. 149.

In the well-known case of *Stevens v. Jeacocke* the same 11 Q. B. 741.

question was discussed. The case, however, cannot be fairly understood by the report alone, without reference to the statute. The pilchard fishery in a certain arm of the sea was made the subject of statutory regulations, a proper turn and station being allotted to each fisherman. A. fished out of his turn and caught fish which would otherwise have come into B.'s seine. B. suffered loss by A.'s breach of the statutory duty (which was clearly a relative one), but was held not entitled to recover damages in respect of it. There was a pecuniary penalty provided, to go equally between the St. Ives fishery fund and the informer; "*and if any fish should be taken out of turn, they were to be forfeited to the fisherman whose turn had been infringed.*" There is no doubt that the plaintiff's case was thus specially provided for by the statute; and though this special remedy was not alluded to in the judgment, it is clear that the learned judge had that in his mind, and not the pecuniary penalty, when he said, "If any infringement of a right was shewn, it was one in respect of which a specific remedy had been given."

Public duties. We now proceed to the examination of cases in which there has been a breach of a public duty.

14 Q. B. D. In *Manchester Ry. v. Denaby Main Co.*, a breach of the
209. Railway and Canal Traffic Act, 1854, s. 2, was alleged. Sect. 3 provided a remedy for parties complaining, and sect. 6 prescribed that "no proceeding shall be taken for any violation or contravention of the above enactment, except in manner herein provided." Consequently an attempt to recover in respect of the peculiar injury which arose from the breach of the public duty failed.

2 Q. B. D. In *Wright v. London Omnibus Co.* the question arose under
271. the provisions of 6 & 7 Vict. c. 86, s. 28, against furious driving of hackney carriages. The penalty against the driver fixed by the Act was £3; "and where any hurt has been caused the justice may adjudge as and for compensation to any party aggrieved not more than £10." The plaintiff was run over,

prosecuted the driver and accepted the £10 compensation. He afterwards sued the driver's master for further compensation, because he had suffered a greater amount of damage. Cockburn, C.J., held that as against the master the matter was *res judicata*, because the liability fell either on the master or the servant, but not first on one and then on the other. If the servant's liability were accepted that must be taken subject to the limit imposed by the statute; this limit would of course not apply if the master's liability had been first accepted.

[cf. "Joint Tortfeasors," p. 47.]

In *Watkins v. Great Northern Ry. Co.*, the railway had power to obstruct a public road; but if they did so, the duty of making another road was cast on them. The Act provided, besides the usual compensation clause, a penalty in case of breach of this duty to the trustees of the road, or owner if a private road; and allowed a party aggrieved to bring an action if specially damaged. The Court held that an action would not lie unless some special damage were alleged. 16 Q. B. 961.

In *Boyce v. Higgins*, an action was under the Public Health Act, 11 & 12 Vict. c. 63, s. 19, which provided a penalty against a member of a local board acting when he participated in the profits of a contract; by sect. 133 proceedings for recovery of the penalty were not to be had or taken by any person other than the party grieved without consent in writing of the Attorney-General. The "party grieved" was held to mean a person specially damaged. 14 C. B. 1.

In *Gray v. Pullen*, the facts of which have already been considered, the Exchequer Chamber held that an action could be brought, although the work had been done negligently by a contractor, and that the penalty was only a cumulative remedy. 5 B. & S. 970.

[ante, p. 93.]

This concludes the third and last division of the subject.

The results of the three divisions may now be summarised, as follows:—

- (1.) For the violation of statutory rights (whether *in rem* General summary.

or *in personam*), or for the breach of statutory private duties, an action will lie for damages.

(2.) If a remedy is given by statute for the purpose of *enforcing the obligation*, that is the only remedy which can be used for that purpose; but the giving of this remedy does not take away the right to sue for (at least past) damages.

(3.) If a remedy or penalty is given by the statute to the owner of the right for a *violation of the right*, the action for damages is taken away.

(4.) If a penalty is given by the statute to the Crown or a common informer, the action for damages for a violation of the right is not taken away.

(5.) For a breach of a statutory public duty the punishment is by indictment.

(6.) If a Crown or common informer's penalty is given in the statute for breach of the public duty, the punishment by indictment is taken away.

(7.) If a person has been specially damaged by the breach of the public duty, he has an action for damages at common law.

(8.) If a penalty is given by the statute to the party aggrieved by a breach of this duty, this common law action is taken away.

(9.) Where it is possible, any of the above rules may be applied simultaneously.

§ 4. THE EFFECT OF THE DECISION IN *Atkinson's Case*.

L. R. 6 Ex:
404.
2 Ex: D. 441.

We propose now to consider how these rules are affected by the decision of the Court of Appeal in *Atkinson v. Newcastle and Gateshead Waterworks Co.*

Facts of the
case.

The facts were shortly as follow :—The water company was required by the Waterworks Clauses Act, 1847, to keep their pipes so charged as to ensure a proper supply of water in the fire-plugs to reach the highest storey of the highest house in the area supplied. A fire occurred in the plaintiff's house;

there was not a sufficient pressure at the fire-plug, water could not be obtained to extinguish the fire, and the house was burnt down; the action was then brought to recover damages resulting from the breach of the statutory duty. There was a Crown penalty provided in the statute, but not a penalty to the party aggrieved. The Court of Exchequer held that the case was concluded by the authority of *Couch v. Steel*, which in its turn had been decided on the authority of *Rowning v. Goodchild*; that is to say, that there had been a public duty cast on the defendant company (Baron Bramwell considered it a private duty: and in point of fact, the area of the duty was limited in the same way as that in *Harrop v. Hirst*); that there had been a breach of that duty; and that the plaintiff having been specially damaged had a common law right to recover such damage, which was not taken away by reason of the imposition of a Crown penalty, and which still existed by reason of no penalty having been provided for the benefit of the party aggrieved. Judgment was therefore given for the plaintiff. [ante, p. 194.] [ante, p. 191.] [ante, p. 158.]

The defendant appealed, and the Court of Appeal (Lord Cairns, C., Cockburn, C.J., and Brett, L.J.) reversed the judgment of the Court below.

The principle of the decision is to be found in the Lord Chancellor's judgment, and may be shortly stated to be as follows:—The duty to keep the fire-plugs charged was a public duty; the guarantee taken by Parliament for the fulfilment of this duty was the public penalty of £10; the 43rd section (see below) made it apparent that it was no part of the scheme of the Act to create any such right as that claimed in individuals with a power of enforcing that right by action; and that on the construction of that section, "there being in a certain number of cases" [in which other duties were laid down] "a penalty which the plaintiff himself admits excludes the right of action, the conclusion is irresistible that in the remaining cases also in the same section the legislature intended to give no right of action." Lord Campbell's proposi- Grounds of decision in C. A. [cf. p. 194.]

tion was disapproved: but *Couch v. Steel* was held not to be an authority in the present case, because there the Act was one of public and general policy, while here the Act was rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works (1). It must be confessed that this argument seems rather to tell the other way; but with great submission it is suggested that this consideration may be omitted, as well as the *à priori* arguments used; because there seem to be at least as forcible ones which might be adduced to support the opposite contention.

The gist of the whole judgment lay in the construction of the 43rd section, which, together with the section imposing the duty in question, are as follows:—

Section imposing duty alleged to have been broken.

Sect. 42. The undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire, without making compensation for the same.

Section imposing penalties.

Sect. 43. If, except when prevented as aforesaid, the undertakers neglect or refuse to fix (s. 38), maintain or repair (s. 39) such fire-plugs, or to furnish the town commissioners a sufficient supply of water for the public purposes aforesaid (s. 37), upon such terms as shall have been agreed on or settled as aforesaid, or if, except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid (s. 42), or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered (s. 53), they shall be liable to a penalty of £10, and shall also forfeit to the town commissioners and to every person having paid or tendered the rate the sum of 40s. for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply.

The penalties are to go, half to the informer and half to the overseers of the parish.

(1) But the sections imposing the duty and penalty were in the public Act, which was incorporated, of course, in the private Act.

Now it is clear that this section imposed in a convenient and collective form the penalties with respect to breaches of certain duties imposed on the company by former sections: and it is certainly difficult to understand why in ascertaining the consequence of a breach of any of these duties the whole of the section had to be construed instead of only so much of it as related to the duty in question. It is in this appeal to what is called "the ordinary rule of construction" that (with the greatest respect) the fallacy lies.

Now the duties were these:

(a.) At the request of the town commissioners to affix public fire-plugs in mains (sect. 38); and maintain and repair them (sect. 39).

(b.) To keep a sufficient supply of water in the pipes to which any fire-plug is fixed for certain public purposes (sect. 37) (*i.e.*, to furnish this water to the town commissioners: sect. 43).

(c.) To place fire-plugs near manufactories at request of the owner (sect. 41).

(d.) To keep the pipes charged, the water being taken free of expense to extinguish fires (sect. 42).

(e.) To furnish to any owner or occupier the supply of water to which he is entitled (sect. 53).

Penalties (sect. 43).

(1) In respect of breaches of (a), (b), (d) or (e), £10 to go half to the informer and half to the overseers of the parish.

(2) To the town commissioners, and to persons entitled to a supply of water, £2 per day during continuance of neglect.

There is first to be noticed a curious omission in Lord Cairns' judgment. It was said that the penalty to the party injured (2) only applied to the two cases (b) and (e); it seems obvious that it also applies to (a), a duty also to be undertaken at the request of the commissioners. The obvious reason for not providing a penalty to the injured party in the

General consideration of the case.

remaining case was said to be because in the cases in which it was provided "you have a person or persons known and determined to whom the penalty may be given, but in the case of neglect to keep the pipes properly charged there is no particular person whom you can single out beforehand and say that in the event of a breach he is to be entitled to a penalty." The words "party aggrieved" usually get over this difficulty; but the object seems to have been not so much to fix determinately the party aggrieved as to fix determinately, where possible, the amount of the damages; the legislature therefore seems to have fixed on those cases in which the jury would have some difficulty in assessing them. The duties in respect of which they are given are all *relative* duties, for breach of which an action would lie in the ordinary way. The one public duty is left to take care of itself, so to speak, for the obvious reason that no penalty could be fixed which would be just in all cases; for where a special injury had been incurred by reason of a breach of the duty, there the plaintiff could by the rules of common law prove it and recover. For this reason too the duty (*c*) was left alone; the public penalty not being applied to it. But if the argument of the Court is sound, a breach of that duty even causing special injury would not give the party injured a right of action, because in the penalty section it was entirely omitted.

We have gone at unusual length into this case on account of the great importance of the principle it lays down.

Notwithstanding the decision of the Exchequer Chamber in *Gray v. Pullen*, that duties of this class are not "created by the section imposing a penalty, to be enforced solely by enforcing the penalty," and that the penalty is simply a cumulative remedy, it would seem, that this case is now looked upon as the ruling case on the subject; and if it remains unquestioned it has established the following proposition: "Where a Crown or common informer's penalty is provided for the breach of a statutory public duty, if there is no additional penalty provided to go to the party aggrieved,

Effect of the
decision.
[*ante*, p. 199.]

[Maine on
Damages: 3rd
ed: *add*:]

a person who has suffered special injury has no cause of action." Or perhaps even a more general one still: "The mere fact that the breach of a public statutory duty has caused damage, does not vest a right of action in the person suffering the damage against the person guilty."

Assuming *Atkinson's case* to be good law, this therefore should stand in the place of proposition 7 above. The author is by no means confident that the principle should be even limited to statutory public duties; for the arguments of the Court would seem to apply equally to the case of statutory private duties.

CHAPTER VII.

Mens Rea.

WE have now considered the principal points which arise on a general view of the subject of torts. Before we proceed to consider the special forms which the action for damages takes, it is necessary, since we are dealing with a person's liability for an act, to inquire how far his state of mind at the time of the commission of the act influences the question.

An act and its consequences must be distinguished.

And first, so far as this state of mind is concerned, it is essential to distinguish between an act and its consequences.

The consequences, so far as we are concerned, correspond with legal damage. And liability (except in the case of breaches of statutory duties for which Crown or common informer penalties are imposed) is not liability for the act, but for the consequences of or damage resulting from the act.

General view of principles of damage.

The same act may be productive of as many different sets of consequences as there are people whom the act affects; and the liability of different persons for precisely similar acts may be infinitely varying; in one case being measured by nominal damages only, in another by very substantial or vindictive damages.

Again, the chain of consequences is cut by the law, and the defendant's liability ceases, at that point where these consequences are directed into a new channel by a new acting cause, and at that point only; unless he could or ought to have foreseen the possibility of this new influence operating upon the circumstances he has himself set in motion. This is the principle of Remoteness of Damage.

When the consequences are infinitely small, and in some cases where they apparently disappear entirely and are only

presumed to exist by law, the liability is limited to nominal damages.

It is clear that these consequences may be intended or may not be intended, or may only be intended in part; but the liability for them, when they are traced home to the act, is independent of any such intention or absence of intention.

Presence or absence of intention of consequences immaterial.

If therefore the actor's state of mind affects the question in any way, it is not with reference to the consequences of acts, but only with reference to the acts themselves.

Actor's state of mind affects acts alone.

It becomes necessary therefore to consider the liability incurred in respect of intentional acts, and also of involuntary acts. But there is another class of acts in respect of which liability attaches, which are termed negligent, and which must be considered separately.

Acts are involuntary, intentional, or negligent.

Some little difficulty arises from the different ways in which the word negligence is used. There is the precise meaning attached to the word by writers on jurisprudence; there is the indefinite meaning of ordinary use, when it signifies carelessness; and there is the wider, but still somewhat indefinite meaning implied by the term legal negligence.

Different meanings of word negligence.

It is not unimportant to bear in mind the exact meaning of the word, and the distinction which Austin has so carefully drawn between negligence, recklessness, and heedlessness. As to the last two the acts themselves are intentional. In the simple case of intentional acts, there is a knowledge of the consequences and a deliberate intention that they shall follow the act. Where, however, there is a knowledge of the consequences, and no deliberate intention that they shall follow the act, this neglect of consequences is termed recklessness; and where there is no knowledge of the consequences, and no regard is paid to whether any, or none, follow on the intentional act, this neglect of consequences is termed heedlessness.

Distinction between negligence, recklessness, and heedlessness.

Negligence implies, on the other hand, the neglect of an act; and since tortious liability cannot attach simply for the neglect of an act without more, for negligence to become a

True meaning of negligence.

tort there must be implied a breach of some duty, and it must therefore mean neglect of an act which a person was bound in duty to perform ; or, shortly, neglect of a duty.

Austin thus points out the distinction between negligence and heedlessness [I. p. 441]: "Negligence and heedlessness both suppose *unconsciousness*. In the first case the party does *not* think of a given act; in the second case, the party does *not* think of a given consequence."

Legal negligence.

The conclusion to which Austin arrives is that it is impossible for negligence to be intentional ; and in the strict language of jurisprudence this is no doubt accurate. But as we have already said, negligence is not used in legal language with so much strictness as jurisprudence requires. Its principal feature however, the neglect of an act or of a duty, remains the same. But acts are of omission and of commission ; and duties are positive and negative—duties to do, and duties to forbear. When an act which should have been done is left undone, a positive duty is left unperformed ; and when an act which should have been left undone is done, a negative duty is broken ; in both cases there is a neglect of a duty, or legal negligence. The act in respect of which legal negligence may be charged may therefore be something done, or something left undone ; and so long as this act is a breach of duty, the intention, or absence of intention, of committing it would seem to be immaterial. So also must be the intention, or absence of intention, with regard to the consequences.

The duty neglected may be positive or negative.

Heedlessness and recklessness not independently recognised in law.

Thus it appears that in legal phraseology heedlessness and recklessness have disappeared : in part being absorbed by the term legal negligence ; in part falling under the specific torts, which may be committed heedlessly or recklessly.

Legal negligence may consequently be regarded as a convenient term under which are grouped all those acts whether of commission or omission which do not fall under the head of malicious or fraudulent injuries, nor to which such definite names as trespass, slander, libel, false imprisonment are applied. Nor does this lead to any very grave inaccuracy

because the states of mind only determine the fact of liability, while the measure of liability is determined by the consequences.

The consideration of *Mens Rea* thus divides itself into Involuntary Acts, Negligence, and Intentional Acts; these last splitting up into Fraud and Malice, and generally also into the other well-known torts.

General division of *Mens Rea*.

§ 1. INVOLUNTARY ACTS.

"As to the want of criminal intention," said Lord Kenyon, 2 East 92. C.J., in *Haycraft v. Creasy*, "in the party making the false representation, I have learnt from Lord Bacon's maxims that there was a distinction in that respect between answering *civiliter et criminaliter* for acts injurious to others. In the latter case the maxim applied, *actus non facit reum nisi mens sit rea*; but it was otherwise in civil actions, where the intent was immaterial if the act done were injurious to another." The intent here referred to is obviously intentional injury; and does not refer to the consequences of involuntary acts. There are numerous examples of persons being held liable for unintentional injuries, and it may serve to emphasize the distinction which we have dwelt on, and to point out clearly what an involuntary act is, if we notice shortly one or two of the best known cases.

It is no defence that injury is unintentional.

"If a man assaults me so that I cannot avoid him, and I lift my staff to defend myself, and in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavouring to defend myself:" *James v. Campbell* (*per* Blackstone, J., 5 C. & P. 372. in *Scott v. Shepherd*). 2 W. Bl. 892.

Scott v. Shepherd, and indeed all the cases in which the question of remoteness of damage has been decided in the plaintiff's favour, are so many examples of unintentional injuries for which the person causing them has been held liable.

Hob: 134. So also in the case "where one was shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view: yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury by an act of force from another. Such also was the case of *Weaver v. Ward*, where a like unfortunate accident happened whilst persons were lawfully exercising themselves in arms." (Lord Ellenborough, C.J., in *Leames v. Bray*.)

3 East 539.

1 Str: 596.

In *Underwood v. Hewson*, the plaintiff was looking at the defendant, who was uncocking a gun: the gun went off and wounded him, and it was held that he could recover.

3 Lev: 37.

Only consideration, was the act, which produced the consequences, voluntary.

8 Ex: 431.

The defendant in mowing his own land, by accident, and as he alleged unintentionally, mowed a little of the plaintiff's land. He was held liable: "the fact being voluntary, his intention and knowledge are not traversable, they cannot be known:" *Baseley v. Clarkson*. Thus it will be seen that what are called accidents may nevertheless form the subject of an action; the fact that the injury was not intended being more in the nature of an excuse or apology, and is not a defence in law. The only question considered in these cases was whether the act was voluntary, and in all of them it manifestly was; the legality or illegality of the act, and the design or absence of design to injure, making no difference (1). The intention to injure cannot be looked into, it is immaterial; the defendant's act is either right or wrong: *Simmons v. Lillystone*.

L. R. 1 Ex: at p. 274.

But even in voluntary acts, liability for the consequences is taken away if these consequences are to be attributed to the plaintiff's own negligence, unless the defendant in his turn could reasonably have avoided it. As in the case put by Blackburn, J., in *Fletcher v. Rylands*: "Suppose a man leans against my cart. If I remove the cart suddenly, and without warning, not knowing he is there, I am not liable; but if I

4 C. B. 806.

(1) So in a case of infringement of patent, the question must be determined by the facts without reference to the existence or non-existence of a fraudulent intention: *Stead v. Anderson*.

do so knowing that he is there, though he has no right to lean against my cart, yet I am liable if my act injures him."

But where the act is purely involuntary no liability attaches in respect of it, however great an injury may have been suffered. This principle was recognized in *Beckwith v. Shordike*; the facts of the case, however, were held to constitute a voluntary act. The marginal note has been frequently quoted down to the present day: "A merely accidental involuntary trespass may be justified, but a voluntary one cannot."

No liability
for involuntary
acts.
4 Burr: 2092.

Turning once more to the famous squib case, *Scott v. Shepherd*, it was thought quite clear that Willis and Ryall, not being free agents with regard to their share in passing the squib on, but acting *under a compulsive necessity*, and, as we have already pointed out, automatically, were not liable. Or to take another example, a boy pushes another boy against a third, who is impelled against a fourth, who is impelled against a fifth, who is driven against a wall and injured. An action would lie only against the first; the acts of the second, third and fourth, being involuntary, would involve no liability: "as if one should take my hand and strike another." "If one person makes use of another, who is a mere instrument, to do any act, the thing done is the act, not of him who is merely the instrument, but of the person who uses him as such instrument." (*Holroyd, J., Ilott v. Wilkes.*)

[*ante*, p. 164.]
Illustrated by
squib case.

[Note the case
of a ministerial
servant, *ante*, p.
75.]

3 B. & Ald:
304.

One of the best illustrations that can be found of the principle is *Holmes v. Mather*, where the defendant's horses, while being driven by his servant in the public highway, ran away, and became so unmanageable that the servant could not stop them. The plaintiff was knocked down and injured. The only real difficulty in the case arose from the fact that the servant in endeavouring to stop them, gave the horses a pull or inclination in the direction of the plaintiff: but this, as Bramwell, B., pointed out, made no difference, the fact remaining that the horses were running away with the carriage.

L. R. 10 Ex:
261.
Illustration of
a man being
run away with.

"If it were not so," said the learned judge, "it would come to this: If I am being run away with, and I sit quiet and let

the horses run wherever they think fit, clearly I am not liable, because it is they, and not I who guide them ; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible."

11 C. B: N. S.
528.

In *Hammack v. White* the decision was rested by Willes, J., on the same grounds. A man who had just bought a horse took him out to try him in Finsbury Circus. The horse became restive, and notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement and killed a man. The Court held he was not liable : first, because there was no *scienter* ; secondly, because he was on the pavement "by the will of a horse which was running away with him and resisting his efforts to restrain him." Want of care was excluded by the evidence. The question of want of skill was also left open, no evidence being given which would have warranted the assumption. It would seem probable, however, that if the rider were a bad horseman he would be held liable.

Generally
called inevi-
table acci-
dent.

In common parlance such cases are usually termed "inevitable accident." Other cases of involuntary acts, or inevitable accidents, are known as acts of God or of the Queen's enemies.

Another form
of the pro-
position.

This principle sometimes takes another form, namely, that there are certain accidents resulting to property, by reason of its position, which the owner must put up with : for example, where the accident results from the course of daily traffic in the neighbourhood ; or again generally, where the thing causing the damage is without an owner.

2 App: Ca:
743.
Accidents
caused by
things which
have no
owner.

In *River Wear Commissioners v. Adamson* damage to a pier had been occasioned by a vessel driven against it through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel, and had consequently no control whatever over it. The House of Lords held that the owners were not liable. Lord O'Hagan

said that, in his judgment, "the ship should be dealt with as if it had been abandoned at the antipodes, and had been ploughing the ocean without a crew for years before it was driven against the pier."

The recent decision as to the liability for the damage done by a bull in a china shop (*Tillett v. Ward*) seems rather to fall under this case than under *Goodwyn v. Cheveley*, which the Court professed to follow; that is to say, if the finding of no negligence on the part of the drover be correctly interpreted. There seem to be many distinctions between the two cases: for it seems clear that *Goodwyn v. Cheveley* does not warrant the proposition put upon it, "that where cattle trespass upon unfenced land immediately adjoining a highway, the owner of the land must bear the loss." *Tillett v. Ward* does, however, establish that proposition.

10 Q. B. D. 17.

28 L. J. Ex: 298.

[He must suffer so much loss as occurs before the drovers can return. *cf.* p. 98.]

This principle has been thus stated by Lord Blackburn in the *River Wear case*:—

Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river, or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by shewing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner.

General statement of this principle by Lord Blackburn.

But he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land, and a ship or a float of timber on water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage. And, if he can prove that the person who has been guilty of either, stood in the relation of servant to another, and that the fault occurred in the course of the employment, he establishes a liability against the master also. In the great majority of cases the servant actually guilty of the negligence is poor, and unable to make good the damage, especially if it is considerable, and the master is at least comparatively rich, and consequently it is generally better to fix the master with liability; but there is also concurrent liability in the

servant, who is not discharged from liability because his master also is liable. And in a very large number of cases the owner of the carriage, or ship, or float of timber is, or at least is supposed to be, the master of those who were negligent, and consequently the action is most frequently brought against the owner, and is very often successful. But the plaintiff succeeds, not because the defendant is owner of the carriage, or ship, or float, but because those who were guilty of the negligence were his servants.

4 Burr: at p.
2094.

The general principle may be traced in a curious old case mentioned by Mr. Justice Aston in *Beckwith v. Shordike* :—

It is reported in addition to Lord Chief Justice Popham's reports: it is in page 161, *Millen v. Faudrye*. The defendant, with a little dog, chased the plaintiff's sheep out of his ground (where they were trespassing) and drove them off his own ground. They went into another man's ground, which had no hedge to divide it from the defendant's grounds, which were contiguous. The dog pursued them into the other man's land, so next adjoining. The defendant, as soon as the sheep were out of the defendant's own land, called in his dog, and chid him. The owner of the sheep brought an action of trespass, for chasing his sheep. The Court gave judgment "*quod querens nil capiat per billam*"; being of opinion "that trespass lay not in that case"; for, they held it to be an involuntary trespass; whereas a trespass that may not be justified, ought to be done voluntarily. They thought he might lawfully drive the sheep out of his own land, with his dog; and he did his best endeavour to recall the dog, when they were driven out of it; but the nature of a dog is such, that he could not be recalled and withdrawn suddenly and in an instant. Therefore trespass did not lie against him for what he had done.

Involuntary
acts of omis-
sion equiva-
lent to negli-
gence.

The distinction is thus clearly drawn between voluntary and involuntary acts, intention to act and intention to injure. It must, however, be borne in mind that in all the cases we have considered the act has been an act of commission. It would seem that with regard to acts of omission involuntariness is not a defence: in fact, as we have seen, negligence in jurisprudence is the term applied to such an involuntary omission, an unconsciousness of an act or duty which ought to be performed; and this state of mind is included, although, as we have already said, it does not exhaust, legal negligence.

§ 2. LIABILITY OF LUNATICS AND DRUNKARDS FOR TORTS.

The liability of lunatics and drunkards for their torts should more properly have come under the head of Tortfeasors. But the subject is so intimately associated with the question now under consideration, that it has been thought advisable to deal with it in the present chapter.

The statement in the books without exception is, that a lunatic is civilly answerable for his torts, as in Bacon [Abr. Trespass, G.].

“An action of trespass may be brought against a lunatic, notwithstanding he is incapable of design: for wherever one person receives an injury through the voluntary act of another, this is a trespass, although there were no design to injure.” Liability of lunatic.

The rule as thus stated has been handed down by successive writers on the Common Law without much inquiry as to its soundness; it seems to have been drawn from some *obiter dicta* in the shooting case: *Weaver v. Ward*:—“Or if a lunatic kill a man or the like this shall be no felony, because felony must be done *animo felonico*; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man he shall be answerable in trespass, and therefore no man shall be excused of a trespass except it may be judged utterly without his fault.” It is somewhat curious that both this *dictum* and the rule given by Bacon confuse the intention to injure with the intention to act, and in stating the reason why the lunatic is liable give a very good reason why he should not be. Hob: 134.

The general principle, “that whenever one person receives an injury from the voluntary act of another, that is a trespass, although there were no design to injure,” is true; but, as we have seen, it is strictly limited to voluntary acts. A person “wholly incapable of design” is not only incapable of intending injurious consequences of acts, but also of intending the acts themselves. It is not necessary to enter into a physiological disquisition on a lunatic’s state of mind; it is suffi- But query if the rule is altogether sound.

cient to say that there is a form of insanity where the deprivation of the understanding is total, fixed and permanent, where the power of willing or intending is entirely absent. In such a case it is impossible to call the acts voluntary. Where the insanity is partial it may be possible that the rule given by Bacon applies. But it seems clear that that rule cannot apply to acts of lunatics generally, but only to those who can really be said to intend them.

Injury committed during a fit.

The same principle would apply to the acts of a person in an epileptic fit.

It is curious to note that there is only one reported case on the subject, and this was decided in the reign of Elizabeth: *Cro: Eliz: 622. Cross v. Andrews*. It was an action brought against an inn-keeper on the custom of the realm for loss of a guest's goods; the plea was that he was of non-sane memory. And it was held bad; "for the defendant if he will keep an inn ought at his peril to keep safely his guest's goods; and it lieth not in him to disable himself by plea of non-sane memory, no more than in debt upon an obligation." The act was one of omission, for negligence; and, as we have seen, involuntariness is no defence in such a case. And if we are right in assuming lunacy to be a good defence for acts of commission, it is not on account of the lunacy, but because the act is involuntary. Moreover, in this case the insane man's business was presumably being carried on by his servants, for whose acts he would be responsible, sane or non-sane.

Liability of drunkards depends on a different principle.

With regard to drunkards the case is not quite the same. The acts of a drunkard are for the most part involuntary: for example, if in reeling about the street he break a shop window. But drunkenness as a rule being voluntarily assumed, it is no excuse for the commission of a crime: it will hardly therefore excuse a tort. The act, although at the time of commission involuntary, becomes by reflexion voluntary, on account of the voluntary assumption of the state of mind which caused its commission. Or, the making a beast of

oneself may be likened to the keeping of a beast, and as in some cases the *scienter* is presumed, so it will be presumed that a man knows that if he gets drunk he will be likely to commit acts which will produce injuries to other people.

§ 3. NEGLIGENCE.

We now come to the consideration of pure acts of negligence. Legal negligence, as we have seen, implies a neglect of a duty to do or to forbear from doing an act. "Negligence," said Alderson, B., in *Blyth v. Birmingham Water Works Co.*, "is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Some duties are defined by statute, but the neglect or breach of these falls under the distinct category of "Breach of Statutory Duties," and have already been considered. The duties therefore, the neglect or breach of which come under the head of negligence, are those which are imposed by common law; some are precise and well established, and are generally known by the names given to the rights correlative to them. Such are the right to lateral support, the right to ancient lights: it is, as we have said, breaches of those to which no definite name is applied which are included under the head of Negligence. These duties are not to be enumerated; as the incidents of daily life are infinitely varying, so the duties which arise out of those incidents are infinitely varying also; and as often as a fresh set of circumstances is brought forward for the consideration of the Court, so often does it become the business of the Court to inquire what duties and rights these circumstances have called into existence. What is usually called the inquiry in a case whether there was any evidence of negligence is really the inquiry whether any duty existed to do what was left undone, or not to do what was done.

General definition of legal negligence.

11 Ex: at p. 784.

Inquiry as to evidence of negligence is usually inquiry as to existence of duty.

What we have pointed out in the introductory chapter

[cf. p. 11.]

must not be lost sight of; the right violated in all cases will of course be one of the fundamental rights *in rem*, to person, reputation, or property. But in all these cases of negligence, the simple duty to forbear from violating these rights does not arise; but the more complicated question, under the circumstances, which usually involve a right belonging to the defendant himself, what amount of forbearance towards the plaintiff's rights *in rem* was the defendant bound to exercise.

No good end would be attained by giving a catalogue or digest of the innumerable cases that have been decided, nor can we hope to notice any but the most striking examples. We propose to follow in a great measure the plan adopted by Mr. Bigelow in his *Leading Cases*. It will be necessary however, in view of what we have already said, to make a slight alteration of the terms used by the learned American author. He has considered "Negligence as a question of Law or of Fact." Our consideration will be "The determination of what the Duty was under the circumstances as a question of Law or of Fact" (1).

How the
standard of
duty is arrived
at.

[Bigelow, p. 589.]

Test adopted
is the prudent
man's conduct.

How then are we to arrive at the standard of duty by which the acts or omissions to which it relates are to be adjudged? "In the two questions—What is the standard; and where does it exist?—lies the whole law of negligence." In answer to the first question it is generally said that the standard in the English law is the conduct of the prudent man. But this standard, though sufficient for most cases, is sometimes misleading.

[p. 590.]
Extreme limit
of test of
prudent man.

Suppose a blacksmith were to find a watch by the roadside, and discovering it to be full of dirt and gathering rust, should attempt to clean it and put it in order, and in doing so, though exercising the greatest care, should injure the watch: if in an action against him the question should be, did the defendant act as a prudent man in his situation might have done? the answer could not but be in the affirmative. A watchmaker would have done the same thing.

(1) Mr. Bigelow appears to use the word negligence in the loose or "carelessness" sense: the test of the prudent man, which he applies strictly, is, however, sufficient for all purposes.

The test of the prudent man's conduct holds good where the defendant was at the time engaged in his own business or avocation, or in some other in which he has acquired skill, or in something which all men can do alike, (as, for instance, drawing water). Within these limits the test requires that the defendant should be judged by the conduct of the prudent man engaged in the particular labour of his own calling (unless it be a thing which all can do alike), whether he be a digger of ditches or a workman in steel.

Beyond cases of this class the test fails; and if it be made to appear that the defendant has stepped out of his own business, it should seem that a *prima facie* case had been made against him. The judge would not presume the defendant to have skill in all kinds of business; and it would, therefore, be for the party to satisfy the jury that he had acquired the skill of a competent man of that business. And then it would be necessary to shew that he had exercised his skill as the prudent man of that business would have done. In a word, the standard of a man *dehors* his own business is both skill in the thing assumed and the conduct of the prudent man.

If it should be said that this after all is nothing more than the test of the prudent man's conduct, because it is not the part of a prudent man to go out of his own business, the answer is that this is using the word "conduct" in a double sense, as relating both to the degree of care exercised in doing the act which resulted in the damage, and to the change of business. And, besides, it is not always true that the prudent man would not have made the change, for a man may be equally and thoroughly skilled in several kinds of business.

* * * * *

In all other cases of tort than those above mentioned, the common test—the conduct of the prudent man—is, as we have said, sufficiently accurate. But what constitutes the standard in each of these cases is a question of more difficult solution. It cannot be answered in the abstract. Sometimes it is matter of law, and sometimes it is matter of fact; and, even in cases where the standard is defined by the judge, no general rule can be safely laid down until a particular case is stated. We must, then, leave this subject for consideration under special cases.

The question where the standard by which the defendant's conduct is to be judged is to be found, whether in the breast of the judge or in the testimony of witnesses, is no less difficult, and must be answered in the main in the same way. In some cases we shall find the judge tacitly ruling upon the facts before him, supplying from his own breast the rule by which the defendant's liability is to be tried; in others submitting to the jury the rule to be applied. But while the subject of the proper province of the Court and jury in these cases appears, and is in fact, much confused, it is apprehended that there

are certain clear principles underlying it, which, if observed, will relieve the subject of somewhat of its difficulty.

In every case, therefore, when it becomes the duty of the Court to determine on the liability of a person, the inquiry is whether under the circumstances there was any duty cast upon him to act in any way differently; this is tested by the inquiry as to what the prudent man would have done under the circumstances. There must consequently be two questions for the Court, first, to determine on the merits of the case; secondly, to determine on the prudent man's conduct. The facts, therefore, being found, the conduct of the prudent man may be: (i.) matter of common knowledge, usually expounded by the judge; (ii.) already settled by precedent: the question being then withdrawn from the jury; (iii.) *primæ impressionis*: a question really for the jury, but one which falls to the province of the Divisional Court or other Court of review on the question whether a nonsuit was right, or whether a verdict is in accordance with the weight of evidence. Finally, the question for the jury is, did the defendant conform to the standard?

It is in truth the necessity of determining the prudent man's conduct which distinguishes negligence from other well-known torts; in those the conduct of the prudent man is already determined.

We proceed now to examine certain well-known illustrations, which it will be seen fall under the first or third of the above divisions.

Judge often declares the prudent man's conduct.
[*ante*, p. 101.]

[*ante*, p. 168.]

In many cases we shall often find the judge declaring that "everybody knows" what the duty is. As in *Cox v. Burbidge*, Erle, C.J., said the defendant was not guilty of negligence in letting the horse stray on to the highway, because "everybody knows horses do not as a rule kick children on highways." If this form is not used it is generally implied from some such words as "It was clearly the duty." As in *Dixon v. Bell*, where the priming of a gun not having been

entirely withdrawn, it went off and wounded a servant who was sent to fetch it. The Court considered that it was clearly the defendant's duty to have so left the gun as to be out of all reach of doing harm.

This certainty as to the duty, which may be derived from a naked statement of the facts, is sometimes expressed by the phrase *res ipsa loquitur*, which is equivalent to "It is apparent on the face of it." The principle *res ipsa loquitur*.

In *Kearney v. London and Brighton Ry. Co.*, the plaintiff was passing along a highway under a railway bridge belonging to the defendants; it was a girder bridge resting on a perpendicular brick wall with pilasters, and a brick fell from the top of one of the pilasters on which one of the girders rested, and injured the plaintiff: a train had just before gone over the bridge. No more lucid exposition of the way in which this rule is to be applied is to be found than the judgment of Cockburn, C.J., which should be attentively considered. L. R. 5 Q. B. 411; 6 Q. B. 759.

My own opinion is, that this is a case to which the principle *res ipsa loquitur* is applicable, though it is certainly as weak a case as can well be conceived in which that maxim could be taken to apply. But I think the maxim is applicable; and my reason for saying so is this. The company who have constructed this bridge were bound to construct it in a proper manner, and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now we have the fact that a brick falls out of this structure, and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being loose affords, *primâ facie*, a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been from causes operating so speedily as to prevent the possibility of any diligence and care applied to such a purpose intervening in due time, so as to prevent an accident. But inasmuch as our experience of these things is, that bricks do not fall out when brickwork is kept in a General exposition of *res ipsa loquitur*, by Cockburn, C.J.

proper state of repair, I think where an accident of this sort happens, the presumption is that it is not the frost of a single night, or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection, and that care on the part of the defendants which it was their duty to apply. On the other hand, I admit most readily that a very little evidence would have sufficed to rebut the presumption which arises from the manifestly defective state of the brickwork. It might have been shewn that many causes, over which the defendants had no control, might cause this defect in so short a time as that it could not be reasonably expected that they should have inspected it in the interval. They might, if they were able, have shewn that they had inspected the bridge continually, or that such a state of things could not be anticipated, and had never been heard of or known before. Anything which tended to rebut the presumption arising from an accident caused by the defective condition of the brickwork, which it was their duty to keep in a proper condition of repair, even if such evidence were but slight, might have sufficed; but the defendants chose to leave it on the naked state of facts proved by the plaintiff. Upon that naked state of facts, it is not unimportant to see what might have been the cause of the defective condition of this brickwork. We have the fact, the datum, that the brickwork was in a defective condition, and we have it admitted that it was the defendant's duty to use reasonable care and diligence to keep it in a proper condition. Where it is the duty of persons to do their best to keep premises, or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to shew that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen. Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts; that they have not done, and I therefore think this rule must be discharged.

L. R. 4 Q. B.
693.

Example of a
case not fall-
ing within the
principle.

Welfare v. London and Brighton Ry. Co. falls on the other side of the line, the plaintiff being nonsuited. A passenger at a railway station making some inquiries respecting the departure of trains, was directed by a porter to look at a timetable suspended on a wall under the station portico. While there, a plank and a roll of zinc fell upon him through a hole in the roof and injured him; and at the same time a man

was seen on the roof of the portico. The unfortunate plaintiff proved too much, and at the same time too little. Just as the zinc fell, he seems to have caught sight, through the hole, of a man's legs; and the accident was said without doubt to have been caused by something the man did on the roof; and of course the question arose whose servant he was, the company's or the mender's of the roof. One of the most curious features about the case, there being a nonsuit, is, that a point which only required one word from the station-master to clear up was left in doubt because the plaintiff himself could give no information on the subject. And there being this doubt, the matter was left to what may be called the worldly wisdom of the Court. It was assumed that the man was not the company's servant "because it is a matter of universal knowledge and experience that in a great city like this, persons do not employ their own servants to do repairs to the roofs of their houses or buildings; they employ a builder whose particular business it is to do it." The case was, however, considered clear apart from the law as to contractors' servants. The company's duty was "to take reasonable care to keep their premises in such a state as that those whom they invite to come there shall not be unduly exposed to danger." And although there was a hole in the roof large enough to allow a roll of zinc to fall through, it was by one judge held that "there was no evidence that the company were aware that the state of the roof was such as to make it dangerous to send a man on it with zinc"; and by another, that there was "nothing to shew an absence of reasonable care on the part of the company to ascertain in what state the roof was." If the plaintiff had not seen the man's legs, it would have been difficult to distinguish this feature of the case from *Byrne v. Boadle*. There a barrel fell out of a warehouse window on to a person in the street. The Court held that the mere fact of the accident having happened was in this case a presumption of negligence, or a *prima facie* case; the presumption of negligence being evidently the same as the

2 H. & C. 722.

Example of application of principle: things do not fall of themselves.

idea conveyed by the expression *res ipsa loquitur*: "It is the duty," said Pollock, C.B., "of persons who keep barrels in a warehouse to take care that they do not roll out. A barrel could not roll out of a warehouse without some negligence (*i.e.*, carelessness). So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence."

[On whose part?
cf: p. 84.]

4 H. & C. 403. *Briggs v. Oliver* was a similar case. The plaintiff was making inquiries at the defendant's door. He received a push from one of the servants who was watching some packing cases piled against the wall, and one of them suddenly fell. There was no evidence why it fell. But as packing cases do not usually fall by themselves unless there were some negligence (*i.e.*, carelessness) in setting them up, the defendant was held liable.

3 H. & C. 596. *Scott v. London Docks Co.* is another well-known example. The rule we have been considering is thus laid down: "Where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care." On this principle the opinion was expressed in *Skinner v. London and Brighton Ry. Co.*, that the fact of a collision between two trains was sufficient to establish a *prima facie* case of negligence.

Person who
has control
presumed to
be responsible.

5 Ex: 787.

H. & R. 581.

But only when
accident
occurs in
course of
business.

But it was pointed out in *Higgs v. Maynard* that this presumption of negligence could not be extended to all accidents, but only to those where, as in all the cases cited, the accident happened in the course of the defendant's business, over which he is bound to exercise proper control. Therefore where a ladder from some unexplained cause fell against the window of a room in the defendant's house, in which it had been placed, and a piece of glass fell and injured the plaintiff who was passing by at the time, it was held that the defendant

was entitled to judgment. For there was no evidence of how the ladder got there, and it might have been put in the room for purposes not connected with the management of the defendant's household or business, and "we all know that ladders are used for various purposes."

These cases seem sufficient to illustrate the application of the principle *res ipsa loquitur*.

But directly we get away from this principle the cases become more complicated, and the enquiry as to whether any duty existed under the circumstances, more especially in cases *primæ impressionis*, becomes more difficult. Where the duty arising out of certain relations has already been laid down by a series of cases, the functions of judge and jury are well defined; the jury find the facts, the judge applies the law; where it has not been so laid down, it would seem that the more correct question for the jury should be what would a prudent man have done under the circumstances. It is often, however, difficult to find the trace of such a question, a declaration by the Court that the evidence does not warrant the plaintiff's assumption that the alleged duty existed, being in most cases substituted for it.

In *Cotton v. Woods*, a rule was laid down by Williams, J., which has since been frequently approved, that "where the evidence is equally consistent with either view—with the existence or non-existence of negligence—it is not competent to leave the matter to the jury"; and Erle, C.J., said that "many cases had been left to the jury in which he had been utterly unable to find the existence of any legal duty or any evidence of the breach of it," from which it would appear that the question is always for the judge. The case was that the plaintiff's wife on a dark night in a snow-storm proceeded slowly to cross a crowded thoroughfare. The defendant's omnibus was coming up on its right side, at a moderate pace and with abundant time for the woman to get safely across if nothing else had intervened; but in turning back to avoid

Outside this principle cases become very difficult.

8 C. B. N. S. 568.

Where facts consistent with negligence or no negligence plaintiff must fail.

another vehicle she returned and unfortunately met the danger. It was proved that at the time the driver was looking round to speak to the conductor. The Court held on the principle as laid down by Williams, J., that the evidence was consistent with the existence or non-existence of negligence, and therefore it was incumbent on the plaintiff to give affirmative and preponderant evidence of negligence on the part of the driver. As she had not done this, a rule to enter a nonsuit was made absolute.

8 C. B: N. S.
525.

[cf. p. 183.]

In *Marfell v. South Wales Ry. Co.*, a company owning a railway and a tramway which ran side by side, took tolls from the plaintiff for the use of the latter; a fence with a gate ran between them; the gate being left open by the defendant's servants, the plaintiff's horse swerved through fear in front of a train and was killed. The Court were divided in opinion, Erle, C.J., holding that as there was no duty to fence their own land, there was no obligation to keep the gate closed; but the majority of the judges held that the gates being put up ostensibly for the security of those using the rail or tramway, the company was bound to use care and diligence in the management of them, and had therefore committed a breach of duty.

33 W. R. 582.
Diversion of
an old foot-
path.

In *Hurst v. Taylor* an old public highway with footpaths had been lawfully diverted, and a new road, making a sharp angle with the old line of direction, had been made. There was no light or other precaution taken to indicate the change; a passenger going along the road on a dark night went straight on and was injured, and she was held entitled to recover.

Scientific
evidence
received to
ascertain pru-
dent man's
conduct.

A test which is sometimes applied to ascertain whether the defendant in doing what he did, acted as a prudent man, is the requirement of evidence, not of persons wise after the event, but of those capable of forming a reliable opinion, whether the mischief might reasonably have been anticipated; and where the cause of mischief has existed for a long period, and has not got out of repair, or the accident has not happened from its being out of repair, the Court will always be

much influenced by the fact that many people during that period have passed by or over it unhurt. The cases which arise under this head usually involve a duty to fence (where not provided by statute), or a duty to repair.

It must be remembered that this is only as to the negligence or no negligence of the defendant, and is outside any question of the plaintiff's contributory negligence.

In *Toomey v. London and Brighton Ry. Co.* there were two doors on the platform of a station, the one marked "For gentlemen," the other "Lamp room." The plaintiff desiring to go to the urinal opened by mistake the lamp-room door, fell down some steps and was injured. In an action against the company he was nonsuited. 3 C. B. N. S. 146.

In *Bolch v. Smith* the workmen in a Government dockyard were in the habit of using certain water-closets erected for their accommodation, to arrive at which they used certain paths across the yard. The defendant, a Government contractor, was permitted to erect machinery in the yard, which he did across one of these paths. A workman going along this path, stumbled, and putting out his hand to save himself, his arm was caught in the machinery and lacerated. It was held, there being no duty to fence, either by statute or because it was in the nature of a trap, and the absence of fencing being apparent, that the defendant was not liable. 7 H. & N. 736.

In *Cornman v. Eastern Counties Ry. Co.* there was on the platform a portable weighing-machine, the foot of which projected about six inches above the level of the platform. It had been in that position for over five years. The plaintiff being at the station in a crowd was driven against the machine and injured. The plaintiff was nonsuited; Bramwell, B., said, "In such a case it is always a question whether the mischief could have been reasonably foreseen." 4 H. & N. 781. Common enquiry: could the mischief have been foreseen by the defendant?

In *Longmore v. Great Western Ry. Co.*, the company had connected two platforms by means of a wooden bridge, which the jury found to be in a dangerous condition; there was a second bridge at another point of the platform. At the place 19 C. B. N. S. 183.

Unprotected
openings.

through which the deceased fell there was a descent of eight or ten steps, between which and the handrail at the side there was an opening of about seven feet by four without any protection. The bridge had been in use ten years; the accident happened on a moonlight night, but was the first that had ever happened although thousands of people (including the plaintiff) had used the bridge before. The company were held liable.

L. R. 1 C. P.
300.

In *Crafter v. Metropolitan Ry. Co.* the staircase leading down to the platform had a brass nosing which had become worn and slippery from constant use. The plaintiff slipped and was injured. The evidence as to prudent conduct given against the company was that "brass was an improper thing for the surface of the stairs, and that lead would have been better, because less slippery." There was no handrail. Erle, C.J., held that this was not conclusive proof of the company's negligence; more especially as thousands of people (including the plaintiff) had passed up and down the stairs with safety. Willes, J., declined to be influenced by the expert evidence: "We must," he said, "take that evidence with the common experience which every one has. We all know that brass is a material which is commonly used for the nosing of stairs in public offices, steamboats on the river, and other places of much resort." The preceding case was distinguished, because the brass on the staircase was not unusual, whereas a hole or concealed trap was. The prudence of using brass could not be negatived without saying that the common experience of ordinary men as to its safety was fallacious: possibly if many such accidents happened, prudent men might change their opinions as to the advisability of using it. From this point of view, the fact that many had used a thing before is strong evidence of its safety. It must, however, be noticed that the Court seem to have overlooked the fact that the brass, though safe ordinarily, had become slippery from the very fact of this constant use.

Premises
already used
by many
people pre-
sumed safe.

Sufficient examples have been given to illustrate the nature of the enquiry in this class of cases. There is no branch of

the subject of torts which gives rise to so many decisions which are difficult to reconcile. It forms, perhaps, the purest example of judge-made law, and all such law is pervaded with some uncertainty. "The undefined latitude of meaning," said Erle, C.J., "in which the word 'negligence' has been used appears to me to have introduced the evil of uncertain law to a pernicious extent;" in another case, the same learned judge declared himself unable to understand many of the decisions cited as precedents before him. The uncertainty does not lie so much in the extent to which the term negligence is applied, that being a convenient term to express a neglect of duty not known by any other specific name; but in the fact that what one is pleased to call "common knowledge," another may term an "exception to the general rule," because a person's appreciation of common experience depends on the measure of his own experience. Much, too, must depend on the temperament of the judge. Some judges in former times have been supposed to have a leaning in favour of plaintiffs, others in favour of railway companies: but this difference of feeling is common to humanity, and the consequent uncertainty is perhaps not so great an evil as it is supposed to be, for against it must be set the integrity of the bench, and the unflinching desire to hold the balance equally between both parties.

9 C. B. N. S.
at p. 534.

In the two foregoing classes of cases, the duty which has been broken is in the nature of a public duty: it is a duty cast on one of the community towards all who, by fulfilling certain conditions, bring themselves within the scope of it. These conditions are limited, as we have seen, to those between whom certain relations exist: where certain other relations exist the duty is not imposed.

There is, however, another class of cases, involving duties which are held to have been voluntarily assumed towards certain definite persons. They are assumed by contract, but not of necessity with those towards whom the duty exists. The duty arises in consequence of the special relation between

[Included in
II. (8) of pre-
liminary classi-
fication.]

Relations
arising to-
wards persons
not parties
to a contract.

one of the contracting parties and the person injured, which has been created by virtue of the terms of the contract, although the person injured is no party thereto. With regard to such duties, the general rule is that, the assumption of the duty being by contract, its limits are strictly confined by the terms of the contract. There have been many endeavours to extend the area of duty, where it is clear that injury has been suffered by third parties from the neglect of one of the contracting parties to perform the duty thus assumed (1).

It will be better, therefore, to start with the well-known leading case of *Langridge v. Levy*, in which the extreme limit of liability was declared. The case was one of false representation, but the lines of the argument clearly point to it as an ordinary negligence case, aggravated, perhaps, by the misrepresentation. *The father of the plaintiff* purchased a gun "for his son"; the defendant warranted it safe for the use of his son: the gun was unsafe and exploded, and the plaintiff was held to have a good cause of action against the vendor. It was argued that "wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer." This the Court rejected at once. On the principle of *Pasley v. Freeman*, it was clear that the representation made by the vendor would, if it had been made to the son, have given him a right of action: and "if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person, to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for deceit."

[*post*, p. 259.]

Parke, B.

(1) It may be advisable to notice that this law is almost entirely confined to English common law: the American Courts differ widely from our own on this subject; the respective merits of the two series of decisions have been ably discussed by Mr. Bigelow [*Leading Cases*, pp. 613, *et seq.*].

The principle is, therefore, this : where a contract is made, the duties which arise upon it and the remedies in connection with it are strictly limited to the terms of the contract. If nothing is said about other people, the duties only arise towards the parties to the contract : if an express mention is made as to including other parties in its operation, then, if both parties accept this inclusion, a duty arises towards those parties, and a remedy for its breach is given to them ; but to no others is it given, and in no other way is the scope of the duty extended, and if others are injured by the breach of the duty, it is only *damnum absque injuriâ*. And the extent of the duty is not necessarily identical with the contractual duty, but is gauged by that part of the contract only which refers to the third party ; it is in consequence of this reference that the relation which creates the duty arises.

A few well-known cases will be sufficient to illustrate this rule. In *George v. Skivington* a man bought some hair-wash for his wife, and the defendant knew the purpose for which it was bought. It turned out to be of a deleterious quality, and an action was held maintainable against the vendor for the wife's injuries. In *Playford v. United Kingdom Telegraph Co.* the telegraph company delivered to the person to whom the message was addressed a wrongly-worded message : and in *Dickson v. Reuter's Telegram Co.* the message was delivered to the wrong person entirely. In both cases the actual receiver suffered considerable damage, but in both cases it was held that the plaintiff was not entitled to recover, on the broad ground that the contract which the company had undertaken was made with the sender alone, and that the duty was consequently toward the sender alone. The second ground was that there had been a false representation made, but without any fraud or knowledge of its falsity.

The relation must therefore arise by express terms : it cannot arise by implication. For example, the defendant is not liable because he must have known that the contract or its breach affected a third party.

The duties arising out of a contract are strictly limited by the terms of the contract.

L. R. 5 Ex. 1.

Telegraph cases.
L. R. 4 Q. B. 706.

2 C. P. D. 62.

3 C. P. D. 1.

The person to whom a message is sent has no remedy.

The duty cannot arise by implication.

L. R. 3 C. P.
495.

[*ante*, p. 96.]

10 M. & W.
109.

Accidents to
passengers
who have not
taken tickets.

Collis v. Selden was decided on similar grounds: A workman had been employed to hang a chandelier in the parlour of a public-house. It fell and injured the plaintiff. It did not appear in what capacity the plaintiff was in the room nor that the chandelier was so hung as to be in the nature of a trap to persons using the room, nor that the defendant knew it was badly hung. The case was, however, decided on the ground that the plaintiff was no party to the original contract between the workman and the owner of the house, and that consequently he could not recover against the workman. An action against the innkeeper would depend on different principles. This case must be distinguished from *Rapson v. Cubitt*, the accident, in that case, occurring whilst the works were in progress.

So, in *Winterbottom v. Wright*, where the defendant supplied a mail-coach to the Postmaster-General, and contracted to keep it in repair. B. contracted with the Postmaster to horse the coach, hiring C. to drive. The coach broke down, and C. being injured, it was held that he could not sue the defendant. "Unless," said the Court, "we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which there could be no limit, would ensue. . . . The only safe rule is to confine the right to recover to those who enter into the contract." The duty to keep the coach in repair was clearly owed to the Postmaster-General and to no one else; yet the defendant must have known that somebody would drive it, who would be injured if it broke down from want of repair.

There have been some railway cases in which another form of the same question has arisen, namely, the liability of a company for an accident to a person who has not himself taken a ticket, as a child or a servant, the contract being made with the parent or master. The distinction between those and the preceding cases has been apparently drawn in this way: the fact that a person has taken two tickets

must be sufficient notice to the company that another person is going to travel on their line: but this would hardly apply where only one ticket was taken, and that for another person. But it is conceived that, although the other judges did not accept the position, the true rule was stated by Blackburn, J., in *Austin v. Great Western Ry. Co.*: "The right which a passenger has to be carried safely, does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely." It is essential, however, that there should have been no fraud on the part of the person injured, for "if the plaintiff had been taken into the train without the defendant's authority, no such duty would arise."

L. R. 2 Q. B.
442.

The right to be carried safely is independent of contract.

This was approved by the Court of Appeal in *Foulkes v. Metropolitan District Ry. Co.*, where the ticket for travelling over the line of B company was issued by A company. The principle expressly laid down was that the duty to carry safely arose from the fact of the plaintiff being a passenger.

The recent important case of *Heaven v. Pender* introduces an apparent modification of this principle; but the ground which the majority of the Court of Appeal adopted puts the decision on an entirely different basis. The case will, therefore, be considered under the head of Invitation.

The next group of cases to be examined deals with accidents to people while on the premises of others. And here the prudent man test is peculiarly applicable.

The cases are conveniently divided under three heads:

- (i.) Volunteers.
- (ii.) Bare licensees.
- (iii.) Those who come on an express or implied invitation.

(i.) *Volunteers.*

Volunteers on other people's property are clearly trespassers: and we have, therefore, to inquire whether a trespasser can have in any case an action against the owner of the land for injuries received while trespassing.

Rights of trespassers examined.

A distinction seems to be drawn, and it would appear just, between accidents which happen to trespassers from the nature of the property on which they trespass, and those which happen from some direct act of the defendant especially designed to catch trespassers.

Cro. Jac: 158.
Accidents
which happen
without
design on
defendant's
part.

In *Blyth v. Topham* it was held that no action lay for the destruction of a mare, which, when straying, perished by falling into a pit which the defendant had dug on a common. This case may be taken as a typical one: so far as the defendant is concerned he may do what he likes on his own property so long as he does not interfere with the rights of others: and the trespasser had no right to be there; if the act is to be attributed to the defendant at all it is distinctly an involuntary act for which, as we have seen, he is not liable.

So if a man climbs over a wall into another man's property, and in descending on the other side, he falls into a cucumber frame and injures himself, he will have no action for his injuries.

4 Bing: 628.
Accidents
which happen
with design;
e.g., from the
setting of
spring-guns.

But where a trap or spring-gun is set other considerations arise. In *Bird v. Holbrook* a spring-gun was set in a walled garden; there was not only no notice of its existence, "but it appeared by the evidence that the defendant had purposely abstained from giving any, in order that the thief (as he said) might be detected." The plaintiff was in search of a stray pea-hen, and, having trespassed on the garden, the spring-gun went off and injured him severely. The Court of Common Pleas held he was entitled to recover, because (independently of the statute 7 & 8 Geo. 4, c. 18) the setting spring-guns without notice was an unlawful act. The correctness of this position has been doubted; but the principle would appear to be accurate, the only question being as to the nature of the act, whether it must of necessity be an indictable act or only an inhuman one. Possibly the question, what protection a reasonable man should take to secure his property against

damage by trespassers, would afford the correct solution in every case where the act is not indictable. It will be remembered that it has been held not unreasonable to allow a ferocious dog to be loose in a yard at night. [cf: p. 106.]

But even in the case of dangerous instruments it has been held that a notice put up on the property that they are set there, though not indicating their precise locality, will be sufficient to protect the defendant from liability if the plaintiff knew of the notice. The maxim *volenti non fit injuria* applies; for the plaintiff voluntarily exposes himself to the mischief which is likely to happen: *Ilott v. Wilkes*; *Jordin v. Crump*. Where notice is given.
3 B. & Ald:
308.
8 M. & W.
782.

Closely allied to this group of cases is the question of excavations near highways. In *Barnes v. Ward* the defendant had dug a hole quite close to the highway and had left it exposed; the plaintiff (all negligence on his part being negatived) walking along the road fell into it and was injured. It was held after two elaborate arguments to be a public nuisance, on the ground that "the danger thus created might reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway." The plaintiff was therefore specially injured by a public nuisance; and moreover, his act being unintentional he was held to be no trespasser. Excavations near highways.
9 C. B. 392.

But, in *Hardcastle v. South Yorkshire Ry. Co.*, the excavation (a reservoir in which a passer-by was drowned) was near the highway, but not adjoining it. The action brought by the widow of the deceased was held ill-founded, and the case was distinguished from the preceding one on the ground that the excavation being at some distance from the way, the deceased before he reached it was a trespasser. In every case, therefore, it should be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous. 4 H. & M. 67.
If plaintiff is trespasser before he is injured, he has no remedy.

(ii.) *Bare Licensees.*

- Two cases very similar to the last, are reported with regard to a bare licensee. In *Hounsell v. Smyth* the public, with the license and permission of the owners, had been used and accustomed to go across a certain waste. In the waste, somewhere between two public roads, was a quarry. On a dark night the plaintiff was crossing from one road to the other and fell into the quarry. The Court held that the principle of the two preceding cases applied, and that the allegation of user and license made no difference, because it did not imply any substantive right. "Suppose," said Williams, J., "the owner of land near the sea gives another leave to walk on the edge of a cliff, surely it would be absurd to contend that such permission cast upon the former the burden of fencing. Can it make any difference that there is a public highway open to, but at some distance from, the cliff?" And in *Dinks v. South Yorkshire Ry. Co.* the defendants had made a canal at a distance of more than twenty feet from the highway, with a towpath on the bank of the canal and an intermediate space. The public were allowed to walk on the space between the highway and the canal, but owing to some works the highway had become merged temporarily into the intervening space. The Court held, on the authority of the previous cases, that there was no cause of action consequent on any person falling into the canal, and that the obliteration of the path did not make the canal adjoin the highway.
- 7 C. B. N. S. 731. Grant of leave and license does not impose any duty to take greater care.
- 3 B. & S. 244.
- L. R. 2 C. P. 371. People allowed to use a way must take it as they find it.
- In *Gautret v. Egerton* the public had been for some time allowed to walk over the bridges belonging to a dock and canal company. One of them was in an unsafe condition, and the husband of the plaintiff fell into the dock and was drowned. A demurrer on the ground that there was no legal duty or obligation on the part of the defendants to take means for preventing the bridges being unsafe was upheld. Willes, J., held that where the public were allowed to use a way they must take it as they find it. The permission was in the character of a gift, and "the principle of law as to gifts is that

the giver is not responsible for damage resulting from the insecurity of the thing unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declaration in this case that their land (and bridge) was in the same state at the time of the accident as it was in at the time the permission to use it was originally given."

There is thus no general duty to keep in repair as against bare licensees. Such duty as there is may be inferred from the following sentence: "Every man is bound not wilfully to deceive others, or to do any act which may place them in danger" (Willes, J.).

No duty to licensees except not to injure them wilfully, but must caution them against known dangers.

It would seem, however, that if leave is given to use a certain place in which the licensor knows that there is a hidden danger, trap, or latent defect, there is a duty cast on him to caution the licensee. But this must be limited to the terms of the license. In *Ivay v. Hedges* the plaintiff, a tenant of apartments, had a license from his landlord to use when he liked a certain leaden roof to dry his clothes on. There was a defect in a rail which was situate upon this roof, which defect was known to the landlord. The plaintiff went up on the roof for the purpose of removing some linen which was there, when his foot slipped, and the rail being out of repair, he fell through to the courtyard below and was injured. It was held that inasmuch as the plaintiff had a mere license to use the roof if he wished, there was no duty upon the defendant to fence or keep the fence in repair.

9 Q. B. D. 80.

In *Batchelor v. Fortescue* the deceased was employed by a builder to watch some unfinished buildings. Some men were at work excavating the adjoining land by means of a winch crane and bucket: while the deceased was watching the work the bucket fell and killed him. It was held that at the most he was a licensee, and that even then the master was under no duty with regard to him to provide a perfectly strong chain.

11 Q. B. D. 474.

(iii.) *Invitation.*

Duty towards person invited to use reasonable care to prevent damage.

The third class of cases are those in which there is an invitation, express or implied, to enter a person's property, excluding the case of servants and others employed on premises.

"The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows, or ought to know, such as a trap-door left open, unfenced and unlighted" (Willes, J., *Indermaur v. Dames*). "The distinction is between the case of a visitor who must take care of himself, and a customer, who as one of the public, is invited for the purposes of business carried on by the defendant" (Erle, J., *Chapman v. Rothwell*).

L. R. 1 C. P. 274; 2 C. P. 318.

E. B. & E. 168.

Persons who are included in this class.

Willes, J., pointed out that the protection would extend to the customer quite apart from the fact whether he was buying at the time, and also to the customer's servant if he were afterwards sent into the shop: "The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, *but who go upon business which concerns the occupier, and upon his invitation express or implied.*" Such a visitor is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know. The facts in *Indermaur v. Dames* were these: A journeyman gasfitter in the service of a patentee went on to a sugar refiner's premises to inspect some fittings, in accordance with a contract between the patentee and the refiner. A shoot on a level with the floor, used in connection with the business, was open, and without any fault on his part the fitter fell down it. On the principles above laid down it

was held that the shoot, although it was necessary to the business to leave it open at certain times, was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having notwithstanding a right to go there, and that consequently the plaintiff was entitled to recover.

John v. Bacon was decided on similar principles. A. L. R. 5 C. P. 437.
 agreed to carry B. from M. to L. The mode of transit provided was that B. should come on to a hulk lying in M. harbour, and wait for the steamer to L. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was left unguarded and unlighted, and B. fell through it and was injured. The hulk belonged to a third party, and A. had only acquired a right to use it for the purpose of embarking passengers on his steamer. It was held that although the hulk did not belong to him, yet he was responsible for hidden dangers, by reason of the invitation held out by him.

On similar grounds the defendant was held liable in *Elliott v. Hall*. 15 Q. B. D. 315.
 He had consigned coals in a waggon which he had hired from the Midland Waggon Company. The company kept their trucks in repair. The consignee's servant during the unloading was injured in consequence of the insecure state of the waggon. The Divisional Court held that there was a duty laid on the consignor towards those persons who necessarily would have to unload or otherwise deal with the goods, to see that the truck or other conveyance is in good condition and repair so as not to be dangerous to such persons.

Many of the railway cases already noticed fall within this class. It is important to notice the distinction between a man going into a shop purely on his own business, for example, to beg for a charity; and one who goes in on business in which the shopkeeper has any interest. And to entitle him to recover it is incumbent on the plaintiff to shew clearly that he was on the premises on the defendant's business. In *Southcote v. Stanley* the declaration alleged that 1 H. & N. 247.

An invitation is implied when a person enters on owner's business.

the defendant, the proprietor of an hotel, "invited the plaintiff to come as a visitor"; that he had entered and had suffered injury from a glass door which had been improperly hung. This being consistent with his being a mere caller, and this not being disproved, he was held not entitled to recover.

It will thus be seen that in the case of people invited the duty is a much wider one than in the case of volunteers or guests. The scope of it is that the person inviting must protect them from all unusual dangers. It does not seem necessary that the danger should be hidden, but it must be one that the defendant knew of, or, as a reasonable man, ought to have known of. The invitation may be express, it may be given by the owner of the property or his agents within the scope of their authority; or it may be implied from the owner's acts, or from his omission to do something he ought to do. Where, however, the invitation is implied from acts, such as opening a shop, the entry must be in some way connected with the defendant's business.

**L. R. 6 Ex:
123.**

In *Holmes v. North Eastern Ry. Co.* the consignee of some coals, with the permission of the station-master, assisted the railway servants in the delivery of his coals which had to be effected in an unusual way. While doing so he stepped on a flagstone which was in an insecure condition, and was injured. It was held that he was not a bare licensee, but was engaged with the defendant's sanction in business of common interest to both parties. There was therefore a duty cast on the defendants that their premises should be in a reasonably secured condition.

**L. R. 7 H. L.
12.**

Leaving gates open at a level crossing of a railway was held by the House of Lords to be a tacit invitation to the public to cross in safety: *North Eastern Ry. Co. v. Wainless*.

**Railway cases:
trains not
stopping at
platforms.**

There are a series of railway cases which fall under this head. Their main features are as follows: The train has stopped at a station: but from some cause or other, generally the unusual length of the train, some of the carriages have

overlapped the platform; in descending from a carriage the plaintiff has either missed his foothold and been injured, or from insufficient light has jumped on to a heap of rubbish which has caused him some damage. It is not necessary to dwell on the arguments for and against holding the company liable, they will occur to the mind of every student. The only question for the Court in every case has been, Was there an implied invitation to alight? If there was, then the company is liable; if there was not, then there is no liability. The rule would seem to be this: Bringing the carriage to a standstill at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended that he shall get out (but not that he will be carried beyond his destination if he does not), and that he may do so with safety, without any warning of his danger (such as "keep your seats"), amounts to negligence on the part of the company for which an action may be maintained. See *Bridges v. North London Ry. Co.*,¹ *Cockle v. South Eastern Ry. Co.*,² *Lewis v. Chatham and Dover Ry. Co.*,³ *Weller v. London and Brighton Ry. Co.*⁴

¹ L. R. 7 H. L. 213.² L. R. 7 C. P. 321.³ L. R. 9 Q. B. 66.⁴ L. R. 9 C. P. 126.

We now come to the important case of *Heaven v. Pender*, to which we have already referred. The facts were as follow: The defendant was owner of a dry dock used for painting and repairing vessels. A ship was docked, the contract between the defendant and the owner including the supply of the necessary staging and appliances for painting the hull, which were then handed over to the shipowner, and were out of the dockowner's control. The plaintiff was a workman employed by the painter who had contracted for the work: he was at work on the staging, when one of the ropes gave way, and he fell into the dock and was injured. With one slight variation, namely, that the property in the staging did not pass to the shipowner, the case to all appearance is on all fours with *Winterbottom v. Wright*, and so the Divisional Court considered it. There was a contract to supply an

11 Q. B. D.

503.

Case of goods supplied to be used on supplier's premises.

[ante, p. 232.]

[*ante*, p. 230.]

The dock-owner practically invited the painters to use the staging.

article, and there was no express mention of the party by whom it was to be used as there had been in *Langridge v. Levy*; although, as in the stage-coach case, it must have been obvious to the person supplying the article that it was to be used by somebody other than the contracting party. Cotton and Bowen, LL.J., however pointed out what is conceived to be a very accurate distinction. The defendant was the owner of a dock for the repair of ships, and provided for use in the dock the stages necessary to enable the repairs to be carried out, "and the stages which were to be used only in the dock were appliances provided by the dock-owner as appurtenant to the dock and its use." Thus the contract for the supply of the staging disappears, and people who came to the vessel to paint or repair her, and in so doing to use the appliances provided for them, although provided by contract between the dock- and the ship-owner, came to the dock for business in which the dock-owner was interested; and therefore in the opinion of the learned Lords Justices they "must be considered as invited by the dock-owner to use the dock and all appliances provided by the dock-owner as incident to the use of the dock." To this position the law which we have already considered is easy of application. The defendant "was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed."

[*ante*, p. 238.]

In *Indermaur v. Dames* the premises were at the time of the accident under the control of the defendant. In this case the stage had passed out of the control of the dock-owner. Applying the foregoing principles, when it was shewn that the defect existed at the time the stage was provided, the two cases become precisely similar.

If the stage had been supplied by another contractor, it seems clear that this reasoning would not apply to an action

against him: and consequently the actual decision of the Court of Appeal leaves untouched *Winterbottom v. Wright* [ante, pp: 231, 232.] and *George v. Skivington*.

It is impossible, however, to pass over the important judgment delivered by Brett, M.R., although the rest of the Court refused to accept the principle he laid down. The learned Judge considering that the duties under every set of circumstances were determined by the relation in which the parties stand to one another, and that whether the case were one of collision, or one of carriage, or any other, there must be one uniform standard of duty, or one proposition equally applicable to all cases by which the defendant's liability can be judged. "The proposition which the recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think, would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." This proposition undoubtedly includes all the recognised cases of liability, and common sense at once accepts it as a reasonable one, but it cannot be denied that no case has ever gone to the same length. Many of the cases are not such reliable guides as they might otherwise be had they not been decided on technical points of practice; many have gone off on the insufficiency of the declaration, the decisions in fact being that no duty was *alleged*, not that no duty *existed*. Even *Winterbottom v. Wright*, the stage-coach case, is not quite so satisfactory as it might be, because "the declaration relied too much on contracts entered into with other persons than the plaintiff." But it is clear that that decision as generally understood contradicts the above proposition, or would have been overruled had the full Court of Appeal accepted it; and the same remark applies to the telegraph cases.

Judgment of
Brett, M.R.

The principle
enunciated
goes beyond
decided cases.

[ante, p. 232.]

[ante, p. 231.]

General rule.

As it at present stands the law cannot be stated in any other way than this: Where a contract is made, the duty created by it is towards the contracting party, and towards any one expressly mentioned by the terms of the contract. The proposition that a duty is raised towards those whom the contractor as a reasonable man would expect to be affected by it, for example by using property sold, is recognised in America, but at present cannot be said to be English law.

Accidents to Servants on Master's Premises.

The greater part of the law relating to the liability of a master for accidents to his servants has been consolidated by the Employers' Liability Act of 1880 (43 & 44 Vict. c. 42). There seems to be no doubt, however, that some part of the Common Law remains untouched. For a careful and accurate summary of the effect of the Act on the Common Law the reader cannot do better than study the analysis given by Mr. Macdonell in his *Law of Master and Servant* [p. 657]. Other duties are laid on the master by statute, such as the duty to fence, a subject we have already considered.

Outside the Act the rule as to servants is the same as to customers.

Beyond this the duty of the master towards his servant is the same as it is to those who have a right to resort to his premises, or use his materials for his work; and the rule as to them would be the same as it is with regard to customers.

2 H. & N. 213.

It will be sufficient to refer to one case, *Roberts v. Smith*. The defendants employed a labourer to erect a scaffold. The materials were in a bad condition. The labourer broke several of the putlogs in trying them, but his employer told him to break no more as they would do very well. The man used those which seemed sound; one of them however broke, and the scaffold gave way, and the man was injured. The Court held that there was evidence to go to the jury that the defendant had been guilty of negligence in not seeing that proper materials had been supplied.

It was said by Martin, B., that this duty was not contractual, although in many cases it is treated as such: *Riley* 3 H. & N. 445. v. *Baxendale*.

The defence of "common employment," is now almost entirely within the statute; it will therefore be sufficient to give the accepted definition of what constitutes a common employment. "Common employment."

"When the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do," the servants are said to be engaged in a common employment. (Brett, L.J., *Charles v. Taylor*.) Definition. 3 C. P. D. 496.

The common master is of course essential, and therefore where one of the men is working for a contractor and the other for the person for whom the contractor is doing the work, no question of common employment arises: See *Rourke* 2 C. P. D. 205. v. *White Moss Colliery Co*.

§ 4. CONTRIBUTORY NEGLIGENCE.

We have now to examine what acts on the part of the plaintiff will excuse the defendant from liability in respect of his own negligent act: how far the plaintiff may contribute to the accident and still be entitled to recover.

The theory on which the defendant is absolved from liability has been very aptly said to flow directly from the principle of remoteness of damage, and the rules as to contributory negligence will be found to tally in all respects with that principle. A man is liable for all the consequences of his acts however far they may extend until some fresh cause intervenes and diverts those consequences into a fresh channel: unless he knew or ought to have foreseen that this fresh cause was likely to arise. Rules as to contributory negligence flow from principle of remoteness of damage.

L. R. 4 C. P.
739.

Indeed, in *Adams v. Lancashire and Yorkshire Ry. Co.*, the question was treated as one of remoteness of damage. The door of a railway carriage had opened several times of its own accord. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped in three minutes at a station. In endeavouring to shut it for the fourth time he fell out and was injured: and it was held he could not recover, because the natural result of the company's negligence was personal inconvenience only.

Use of the
word "negli-
gence"
examined.

Some little difficulty arises however as to the use of the word "negligence," which at first sight seems not to be used in the strict sense to which we are now accustomed. Instead of the neglect or omission to perform a duty owing to some one else which is implied in legal negligence, we find the word used as nearly akin to carelessness, or want of ordinary and common care and caution. Very little difference however in fact exists. In cases of legal negligence the proof that a legal duty existed, and that it had been violated, was, as in all other torts, essential. But where this duty was not clearly defined, where any new set of circumstances required the consideration of the Court, there the duty had to be ascertained by making the inquiry "What would a prudent man have done under the circumstances?" So in the case of contributory negligence the inquiry can only be "Did the plaintiff act as a prudent man under the circumstances?" That is the test of what he ought to have done; and thus it appears that the test is in both cases the same.

No breach of
duty towards
defendant,
but failure to
behave as
prudent man.

18 C. B. N. S.
584.
L. R. 1 Ex: 13.

Examples in
level crossing
cases.

No better example of the reasonable man test can be found than the level crossing cases, *Bilbee v. London and Brighton Ry. Co.* and *Stubley v. North Western Ry. Co.* The point submitted to the Court was that there was a duty on the part of the railway to put a man to warn people attempting to cross that a train was approaching. But this was tested by another inquiry, whether a reasonable man would require this protection. In the first case, where there was an abrupt turning or tunnel so that the person could not see the train coming, the

Court thought that it was not contributory negligence for the plaintiff to cross the line; but in the second, where a person could see 300 yards in each direction, the person crossing was held guilty of contributory negligence.

The leading case on the subject is *Tuff v. Warman*. The judgment of the Court was delivered by Wightman, J., and has always been cited as an accurate exposition of the law. "The proper question for the jury is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover: in the latter not: as but for his own misconduct the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not however disentitle him to recover, unless it were such that but for the negligence and want of ordinary care and caution the misfortune would not have happened; nor if the defendant might by the exercise of caution on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

26 L. J: C. P. 263.

27 L. J: C. P. 322.

Plaintiff cannot recover if his negligence contributed to the accident,

unless defendant was negligent in not avoiding the plaintiff's negligence.

The rule, it will thus be seen, consists of two parts. The first is the simple proposition that the plaintiff in an action for negligence cannot succeed if the jury find that he has himself been wanting in ordinary care, and if this want of care has contributed to cause the accident. The second is a modification of it; although the plaintiff has been guilty of negligence which has in fact contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. (Lord Penzance, *Radley v. North Western Ry. Co.*) Of this modification the well-known case of *Davies v. Mann* affords the best example. The plaintiff had left an ass fettered in

1 App: Ca: 754.
10 M. & W. 584.

e.g., driving
over a donkey
tethered in the
street in the
daytime.

the fore-feet in the highway. The defendant in broad daylight drove over it. The Court held that although the ass was in the highway by the plaintiff's negligence, yet that was no answer to the action unless its being there was the immediate cause of the accident. The defendant was still bound to go along the road at such a pace as would not be likely to cause mischief.

11 East 60

In the earlier case of *Butterfield v. Forrester*, a pole was placed across the street, and the plaintiff riding violently down the street in broad daylight came in contact with it and was injured. Assuming that the pole was not an obstruction to the whole street, it would appear on the authority of the donkey case that the owner of the pole could have brought an action against the rider. But the action was brought by the rider against the owner of the pole; and it was held that he could not recover because he might "by the exercise of ordinary care have avoided the consequences of the defendant's negligence."

We have therefore these two propositions:—

i. The plaintiff cannot recover if with ordinary care he could have avoided the defendant's negligence.

ii. The plaintiff can recover if the defendant with ordinary care could have avoided the plaintiff's negligence.

In other words the plaintiff will be held guilty of contributory negligence if with ordinary care he could have avoided the accident; the plaintiff will be held not guilty of contributory negligence if with ordinary care the defendant could have avoided the accident; that is to say, the defendant's negligence remains without excuse.

5 E. & B. 849.
Case of
unfenced
machinery.

It is important to notice the decision in *Caswell v. Worth*, to which apparently either of the above rules would apply. Machinery was, contrary to the statute, left unfenced. The plaintiff was told not to touch it; he touched it and set the machinery in motion, and, in consequence of its not being fenced, was caught and injured. It was held he could not

recover. Having been informed of the danger it was clear he could with ordinary care have avoided the accident; so too with ordinary care (by fencing, which is the statutory provision as to the amount of ordinary care requisite) the defendant could have avoided the consequence of the plaintiff's negligence. The case can therefore only be solved by the ordinary rule of remoteness of damage as to the intervention of a new human agency. But could it not be said even to this, that a man might very reasonably anticipate such an accident happening? The case possibly resolves itself into one of a class in which the question, although based on the same principle, assumes a somewhat different form. This question is not whether with ordinary care the plaintiff could have avoided the defendant's negligence, but whether what he did was justifiable under the circumstances, justifiable, that is, according to the prudent man test. If it was justifiable then it was such an act as must have been reasonably within the contemplation of the defendant; and this brings us round again to the principle of remoteness of damage.

In *Gee v. Metropolitan Ry. Co.* the plaintiff was leaning against the door of his compartment, when the door opened and he fell out. It was held that he could recover, because his act was not a negligent one, that is, not one which a reasonable man careful of his own safety would not do; and that he was justified in assuming that the company's servants had done their duty by fastening the door. This case is obviously distinguishable from *Adams v. Lancashire, &c., Ry. Co.*, as all the judges pointed out. L. R. 8 Q. B. 161.

On the other hand, in *Wyatt v. Great Western Ry. Co.*, the plaintiff's act was held unjustifiable. The gates at the railway crossing were, in conformity with the statute, shut across the road. There being no porter there the plaintiff opened them himself, and while driving across was injured by a train. 6 B. & S. 709.

In *Jones v. Bence*, the plaintiff having been damaged by jumping off a coach when the horses were running away and 1 Stark: 493.
Extreme remedies may

be adopted to avoid extreme and real dangers: e.g., jumping off a coach.

But not to avoid fancied dangers.

the reins had broken, Lord Ellenborough at *Nisi Prius* told the jury that the question for them to determine was "whether he was placed in such a position as to render what he did a prudent precaution for the purpose of self-preservation." "It is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril." But if the act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained was to be attributed to rashness and imprudence, he would not be entitled to recover.

49 L. J. Q. B. 106.

[ante, p. 240.]

This it is conceived is an accurate statement of the law, and fully meets the difficulty suggested by Bramwell, L.J., in *Lax v. Mayor of Darlington* (1). He reviewed the railway cases which we have already considered under the head of "invitation to alight," coming to the conclusion that where there is no such invitation it is the passenger's duty to "remain in the train, allow himself to be carried on beyond his destination, and then sue the company for damages because they failed in their duty of supplying proper accommodation at their station." The other case suggested seems entirely met by Lord Ellenborough's summing up: "If a man were unlawfully detained by being shut up at the top of a house, he undoubtedly would not be bound to stay there, but if he were to jump out of window and break his leg he would not be entitled to recover for that injury." It is submitted that under certain circumstances he might, if the jury found he was in so doing acting as a reasonable man would. For example, if the house were on fire, and he endeavoured to jump into a blanket held to catch him by the firemen. His lordship was however criticising *Clayards v. Dethick*. There the defendants, who were Commissioners of Sewers, had made

12 Q. B. 439.

(1) The facts were as follows: there was a statue in a cattle market round which the corporation had put some iron railings; these were so low that a cow tried to jump them and was spiked. The owner recovered its value.

a dangerous trench at the only entrance to a mews, putting up no fence and leaving only a narrow passage on which they heaped rubbish. A cabman bringing his horse and cab out of the mews to proceed on his day's work endeavoured to get them over the rubbish, but his horse fell and was killed. The jury found he had not acted imprudently, under the circumstances, and the Court refused to interfere with the finding. It is submitted, notwithstanding the above criticism, that the case is good law.

§ 5. IDENTIFICATION.

The discussion of the subject of contributory negligence usually concludes with a note on a doctrine peculiar, we believe, to English law, which is known as Identification or Imputability. More fully it means the identification of a passenger with the driver of the vehicle in which he is travelling, or with the person under whose control he is at the time of the accident; or the imputability of the passenger with the contributory negligence of the driver or other person.

Identification
of passengers
with drivers.

The leading case on the point is *Thorogood v. Bryan*. The case was shortly this: A collision had occurred between two carriages through the equal negligence of both drivers, so that neither owner could recover against the other. But in an action by one of the passengers against the owner of the other carriage it was held that the action would not lie, because every passenger who selects a conveyance in which to ride identifies himself with the driver of it, and his only remedy is against his own driver or his master.

8 C. B. 115.

This decision has given rise to much controversy. An able note by the editor of Smith's Leading Cases [vol. I. p. 302], was thought for some time to have exposed the fallacy contained in it, more especially as the reasoning of the note was approved by Williams, J., in *Tuff v. Warman*; and as Dr. Lushington in *The Milan* said that he declined to be bound by it, because he knew upon inquiry that it had been doubted by

Comments on
the decision.

[ante, p. 247.]

1 Lush: 388.

high authority, and was not reconcilable with other principles laid down at common law. But in a more recent case, *Armstrong v. Lancashire and Yorkshire Ry. Co.*, Bramwell and Pollock, BB., both considered themselves bound by it, adding "though it must not be supposed that we are dissatisfied with that decision."

L. R. 10 Ex:
47.

Pollock, B., was careful to point out the extent of the identification. It does not mean that by selecting the omnibus the passenger had so acted as to make the driver of it his agent, but that *for the purpose of the action* he must be taken to be in the same position as the owner of the omnibus or his driver.

Extension of
principle of
contributory
negligence.

The principle may therefore be put in this way, the defendant is not liable for negligence if the accident has been brought about by contributory negligence of some other party under whose control the plaintiff was at the time.

28 L. J: Q. B.
258.
So, a child is
identified with
its protector.

Under the rule as thus stated would come the case of *Waite v. North Eastern Ry. Co.*, where it was held that a child, with regard to contributory negligence, was identified with its grandmother who accompanied it. Of course it would be impossible to say in such a case that the child had selected its grandmother to carry it. Even in this case there seems to have been some doubt in the minds of the Court. Cockburn, C.J., said, "The railway company must be taken I think to have admitted the child as a passenger subject to its being duly looked after by the grandmother." Pollock, C.B., rested it on the ground of the contract with the grandmother, a not very satisfactory one. For if I take a ticket for a friend, and an accident happens through the negligence of the company, could it be said that my friend could not recover because my negligence had contributed to the accident? The case put by the Chief Baron seems to shew that he had in his mind the question of joint tortfeasors under which the case might reasonably be thought to fall. In the hypothetical case put it seems clear that my friend could recover against me and the company as joint tortfeasors: and it is difficult

to see why the child could not by his next friend treat his grandmother and the company in the same way ; nor the passenger the owners of the rival omnibuses.

It is to be noted that in two other cases decided the year after *Thorogood v. Bryan*, the exact contrary was held. In *Rigby v. Hewitt* the omnibus on which the plaintiff was travelling was racing with another, in consequence of which the accident to the plaintiff happened. The point was expressly argued on the motion for a new trial "that if the mischief was in part occasioned by the misconduct of the person driving the omnibus on which the plaintiff was, the defendant could not be responsible." Pollock, C.B., refused to adopt the principle, and referred again to the point with satisfaction in the subsequent case, *Greenland v. Chaplin*.

But the contrary has been held.

5 Ex: 240.

5 Ex: 243.

The same point was raised by *Bridge v. Grand Junction Ry. Co.*, but the decision is very technical, and it has generally been considered to be no authority to help us in the discussion.

3 M. & W. 244.

Child v. Hearn was decided on a principle outside *Thorogood v. Bryan*, although identification entered into it. It will be seen that there was there a breach of a statutory duty on the part of the railway company in not maintaining proper fences, consequently the true ground of the decision must be that there was no negligence at all on the defendant's part: consequently nobody could have recovered against the owner of the pigs: and the fact that the servant can be in no better position than the master, when he is using the master's property for the master's purpose, is really beside the true point in the case.

L. R. 9 Ex: 176.
[ante, p. 251.]

CHAPTER VIII.

Of Fraud.

Liability for
voluntary
injuries.

PASSING from involuntary acts and negligence, we come to the consideration of two states of mind known as fraud and malice, in which there is not only a voluntary act, but also a voluntary injury.

First, as to Fraud, it may be active or passive, misstatement of actual facts, or suppression of material facts. At common law either form of it is usually termed deceit.

Objects of
fraud are
varied.

False statements may be made with the intention, express or implied, of inducing another person to do acts (i.) to himself, or made without reference to any other specified person; (ii.) to other specified persons, such as giving credit; (iii.) to the person making the statement; the result in this case being nearly always a contract between the two parties.

Remedies are
also varied
in tort.

The remedies for fraud are various. In all these three cases the fraud constitutes a tort, and the remedy in tort is an action for deceit.

In contract.

But where a contract has been entered into with the person who has made the statement there are other remedies; the first, by suit to rescind the contract; the second, by defence to an action for specific performance of the contract, or for damages for breach of contract. These two remedies have certain rules specially applicable to them, but these are part of the law of contract and do not fall within our province.

The question to which we must direct our attention is whether there are any general and universal principles of fraud applicable to the three cases, or consequences of the

fraud; and whether they are also equally applicable to the three forms of redress.

In dealing with the subject we must not, however, lose sight of the first principle of the law of torts: the necessity that there should be a right violated, or a duty broken.

The questions are in form as follows:

Is there any duty to speak the truth—(a.) Where there is a reasonable expectation that others will act upon it; (b.) Where there is an intention that others shall act on voluntary statements made to them; (c.) Where there is an intention that others shall act on answers given to questions asked by them?

Forms which
the duty or
the right take.

Or again,

Is there any right to have the truth spoken—(a.) In statements not made expressly to me; (b.) In statements volunteered to me; (c.) In statements made in answer to my question?

(i.)

We will first consider the liability for damage resulting from false statements made with the intention, express or implied, of inducing another person to do acts on his own behalf, or made without reference to any other specified person.

Let us take a simple case. I have in a conspicuous place in my house a clock which is an hour slow. A person taking his time from it loses his train and has to hire a carriage. Assuming the damage to be within the rules as to remoteness, it is impossible, on the bare statement of the facts, even to contemplate the possibility of my being liable. At the same time it may be said that under certain circumstances I might be liable. We may ascertain from the decided cases what ingredients must be added to complete my liability.

Simple example of non-liability for misleading statement.

In *Bailey v. Walford* the plaintiff sent to the defendant some samples of printed handkerchiefs with a view to obtaining orders from him. The defendant told him that the design he had printed was a registered one, and that the owner of it

9 Q. B. 197.

Simple example of liability for

misleading
statement ;

was going to proceed against him for an injunction. The plaintiff, in consequence, was put to considerable expense in proceeding to London to make inquiries. The statement was false. Another element of damage was that the defendant, having delayed the plaintiff's manufacture, made use of the design himself, and obtained the command of the market which the plaintiff would otherwise have had for his wares. There was an averment that the defendant knew the statement was false, and that he knowingly and wilfully uttered it ; and the Court held that the plaintiff had stated a good cause of action. Here the statement was made expressly to the plaintiff.

with know-
ledge of
falsity.

5 E. & B. 860.
Cases of ad-
vertisements.
To the public
generally.

In *Denton v. Great Northern Ry. Co.* the company advertised in their time-tables that a train would run to Hull at a certain hour ; the plaintiff made his arrangements accordingly, but there was no such train, and he sustained damage in consequence. The company was held liable for having knowingly made the false representation.

L. R. 9 Q. B.
34-

In *Richardson v. Silvester* the defendant had inserted in a newspaper an advertisement that a certain farm was to be let with immediate possession. The plaintiff went down to see the farm, and incurred expense in examining the property. The defendant knew at the time he inserted the advertisement that he had not the power to let the farm, and that it was not to be let. The Court held that this amounted to a false representation. "It was a false statement knowingly made and published in order to be read by persons who would be likely to be tenants of farms, and the natural consequence would be that a person who was desirous of becoming a tenant would, upon reading the advertisement, incur expense in looking at the farm, and this, it is alleged, is what the plaintiff did." This case carries us farther than *Bailey v. Walford* in two particulars. First, the statement was not made expressly to the plaintiff. As to this the Court adopted the dictum in *Swift v. Winterbotham*, that "it is sufficient if the representation is made to a class of whom the plaintiff is

To a certain
class of the
public.

[Blackburn, J.]

[ante, p. 255.]

[ante, p. 67.]

one, or even if it is made to the public generally with a view of its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby." And, secondly, and intimately connected with this point, is the statement that the plaintiff's acting upon it is the natural consequence of the statement. This really introduces the element of the reasonable man again; because it cannot be supposed that anybody going down casually or from motives of curiosity to see the property could get a day's holiday at the expense of the advertiser of a false statement. It is suggested that the plaintiff's *bonâ fide* desire to purchase the property at a reasonable price is also an essential ingredient to the action. We thus obtain an affirmative answer to this question: Is it not a reasonable thing to expect that intending purchasers will come down to inspect property advertised for sale? (1). Consequently, there is a duty towards them to speak the truth in statements made or published, which are either intended for them to see, or which it is extremely probable that they will see.

Application
of test of the
prudent man.

Desire to
purchase
essential to
such an action.

If we take such a case as the following, it will be seen at once what an important bearing this question of the prudent man has upon the subject. A sporting paper knowingly puts in its windows the name of the wrong horse as the winner of the Derby: a person seeing this announcement pays a bet which he had in fact won. In an action against the editor of the paper for a false representation, the question for the jury would be, Did he act as a reasonable man in relying on the statement and paying the bet; or, should the editor as a reasonable man have foreseen such a consequence?

Hypothetical
case.

(1) The case must be distinguished from *Harris v. Nickerson*, which apparently resembles it. Some furniture advertised to be sold at a public auction was withdrawn. The plaintiff had a commission to buy the furniture and sought to recover damages for loss of time and expense of journey; judgment was given for the defendant, the ground of the decision being, as stated by Archibald, J., that there was no allegation of false or fraudulent misrepresentation. That is to say, there was no knowledge at the time of advertising that the sale would not take place. It is to be observed too in the case that the plaintiff had bought some other lots.

L. R. 8 Q. B.
286.

4 H. & N. 538. "It would be a strong thing," said Bramwell, B., in *Bedford v. Bagshawe*, "to hold that if a man makes a verbal untrue statement to any person, as, for instance, that the shares in a particular company are a valuable security, if that person buys and recommends his friends to buy, that he is to be liable to any one who buys on the faith of such representation." But in that case the defendant, one of the directors of a company, falsely and fraudulently caused it to be represented to the Committee of the Stock Exchange that their rules had been complied with, and thereby procured a settling day to be appointed and the shares to be quoted in the official list. The plaintiff knowing of the rule believed it had been complied with, and bought shares in consequence; the shares were valueless, and he was held entitled to recover his loss from the defendant director. Baron Bramwell added to what has been already quoted: "But it is not a bad rule that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it." (See the remarks on this case and *Bagshawe v. Seymour*, *post*, page 264.)

Case of a statement made with intention of its being circulated.

Ingredients of fraud gathered from foregoing cases.

It will thus be seen that there are three ingredients of fraud: first, a statement false in fact made to the plaintiff directly, or to him as one of the public, or to him indirectly through the medium of another person's acts or words: secondly, a knowledge of its falsity: thirdly, a feeling which in some cases is a hope that the person to whom the statement is made will act upon it, in other cases is a hope that some one may act upon it, and in others again amounts to no more than a carelessness whether any person hears the statement, and hearing it acts on it, or not.

Benefit to person making statement immaterial.

Benefit to the person making the statement is entirely absent: there must however be damage to the plaintiff, but of this we shall speak more fully later on.

(ii.)

Same principles apply to all three cases.

If these ingredients are necessary to the first case, they are *à fortiori* necessary to the second and third cases; for it

is obvious that the only difference between them and the first case is a more definite or precise intention to influence the plaintiff's acts, and to direct the consequences of those acts : in the second case, to affect a third party : in the third, to affect the speaker himself.

The usual way in which the second case arises is where a person is induced to give credit to a third person, the statement made being as to his solvency : and as to this *Pasley v. Freeman* is the well-known leading case.

Joseph Freeman, intending to deceive and defraud John Pasley, did wrongfully and deceitfully encourage and persuade the said John Pasley to sell and deliver to John Christopher Falch divers goods, wares, and merchandises upon trust and credit : and did for that purpose then and there falsely, deceitfully, and fraudulently assert and affirm to the said John Pasley, that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect, and did thereby falsely, fraudulently, and deceitfully cause and procure the said John Pasley to sell and deliver the said goods, wares, and merchandises upon trust and credit to the said John Christopher.

In the elaborate judgments the above principles were approved : one further point was also made, that collusion with the party credited was not necessary. The duty as to answering a question as to a third party's credibility was also noticed : " It is said that the plaintiff had no right to ask the question of the defendant. But all that is required of a person in the defendant's situation is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows." The point emphasised was however the knowledge of the falsity, for therein lies the fraud.

It is however very difficult to fix knowledge : for however strong the assertion may be, without this knowledge the statement can only resolve itself into an opinion. In *Haycraft v. Creasy* the statement was : " I can positively assure you of

Usual form of second case is obtaining credit for third party.

2 Sm: L. C. 66 [8th ed:].

Declaration in *Pasley v. Freeman*.

Collusion with party benefited not essential.

Nature of duty in answering questions.

Knowledge of falsity essential : no liability for (2 East 92.)

expression of
opinion.

my own knowledge that you may credit him (Robertson) to any amount with perfect safety." There was no actual knowledge that the statement was false, and consequently the Court held that it was impossible that there should be an intention to deceive. Wherever, therefore, the statement, in spite of the language used, can be construed into an opinion, the falsity of the statement is immaterial, and no liability will attach in respect of it.

Person dam-
nified may be
the party
spoken of :
this is slander,
or "slander
of title."

The statement, or the answer to the question, may be adverse to the third party; for example, that the person is not to be trusted. The person damnified in such a case will be the party who has been acted against, or refused credit: it is evident that the same principles as to falsity and knowledge are applicable. The tort is then generally called by another name: where it damages the reputation, it is Slander; where it damages property, it is Slander of title.

[cf: pp. 305, 375.]

5 Q. B. 820.

Collins v. Evans may here be cited as a simple case. Execution had been issued by the sheriff against the wrong man: his instructions were received from the plaintiff in the original action, who honestly believed he was indicating the right man. It was held that no action would lie against him.

True effect of
Pasley v.
Freeman is,
if there is
knowledge
there is fraud.

The true effect of *Pasley v. Freeman* seems to be that if there is knowledge there is certainly fraud. The question then arises whether it is absolutely correct to say that there can be no fraud without knowledge: that is to say, whether it is necessary to shew that the defendants knew the fact to be untrue, or whether a state of mind in the speaker, short of this will be sufficient to support the action.

11 M. & W.
401.

Enquiry as to
liability for
state of facts
intermediate
between
knowledge
and opinion.

In *Taylor v. Ashton* the following principle was laid down by Parke, B.: "But then it was said that, in order to constitute fraud, it was not necessary to shew that the defendants *knew* the fact they stated to be untrue; that it was enough that the fact *was* untrue, if they communicated that fact for a deceitful purpose: and to that proposition the Court is pre-

pared to assent. It is not necessary to shew that the defendant knew the fact to be untrue; if they stated a fact which was untrue (1) for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both legal and moral fraud."

Statement of untrue fact, without belief in truth, is fraud.

This case therefore carries us one step further, and establishes liability on something less than absolute knowledge of the falsehood: an absence of belief in its truth. And from this the duty may be deduced, that if a man will speak to another so as to influence his conduct (whether to himself or to another person), he must at least be careful to speak only such things as he believes to be true.

Duty is therefore to say only what is believed to be true.

But so far as we have gone at present we do not find any trace of a duty to ascertain before speaking whether that which a man is going to speak is true or false. This is sometimes put in another form, whether a man takes upon himself to *warrant* the truth of that which he asserts, or at least to warrant his own belief in its truth.

But must speaker ascertain if it is true, or warrant its truth?

There is a most remarkable dictum of Lord Cairns in the *Reese River Mining Co. v. Smith*, which is as follows: "I think it may be quite possible, as has been alleged, that they (the directors) were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue. Upon that part of the case, my Lords, I apprehend that there is no doubt."

L. R. 4 H. L. at p. 79.

Lord Cairns' principle: but *query* if it is of universal application.

It is perfectly clear that this is a very much wider proposition than is warranted by *Taylor v. Ashton*, and it is doubtful whether any other actual decision supports it; the point in the case to which the principle was applied by Lord Cairns being only as to the right of a shareholder to repudiate his shares on the ground of misstatements in the prospectus. A

[*ante*, p. 260.]

(1) "True" in the report.

It may refer only to reckless statements.

L. R. 1 Sc: & D. at p. 162.

person may be ignorant whether a statement is untrue or not, and at the same time he may believe it to be true. The dictum may possibly therefore have to be taken in a somewhat more restricted sense, and with reference only to what may be called reckless statements (1), and this would leave the rule as follows: If a man affirms that to be true within his own knowledge which he does not know to be true, or if he affirms that to be true which he does not believe to be true, either case falls within the notion of a fraudulent misstatement, or, as it is put by Lord Chelmsford in *Western Bank of Scotland v. Addie*: "Supposing a person makes an untrue statement which he asserts to be the result of a *bonâ fide* belief in its truth, how can the *bonâ fide* be tested except by considering the grounds of such belief? and if an untrue statement is made upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit."

This perhaps is the more accurate statement of the law, and in it we find the duty again measured by the standard of the reasonable man.

Special instance of reckless statement: where facts are (6 C. B. 319) peculiarly within speaker's knowledge:

It would seem that where the facts are peculiarly within the speaker's knowledge this test is easy of application. The remarks of the learned judges during the argument in *Jarrett v. Kennedy* point to such a test.

"Cresswell, J.: If a man undertakes to publish as true that which he does not know to be true, he is responsible if it should turn out to be false. Wilde, C.J.: That is, where he is in a situation to know the falsehood of that which he publishes, and neglects to avail himself of the means of knowledge that are within his power."

e.g., representation of

Under this principle may be explained the rule that if a

¹ 2 East 103.

² Cowp: 788.

³ 13 C. B. 786.

⁴ 20 Ch: D. 1.

(1) Lord Kenyon, C.J., in *Haycraft v. Creasy*,¹ Lord Mansfield, C.J., in *Pearson v. Watson*,² and Maule, J., in *Evans v. Edmunds*,³ used language very similar to this. Jessel, M.R., however, in *Redgrave v. Hurd*,⁴ assumed that this dictum of Lord Cairns was only applicable to cases of rescission of contract: as to which see *post*, page 267

person represents himself as having authority to do an act which he has not got, and the other side is drawn into a contract, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not: *Cherry v. Colonial Bank of Australasia*. The point was settled in *Randall v. Trimen*; and *Collen v. Wright*, where W. signed an agreement as G.'s agent, whereby he agreed with C. that a lease of a farm belonging to G. should be granted to C. Both parties believed that W. had authority from G., but in fact there was none, and W. was held liable.

authority
which does
not exist.

L. R. 3 P. C.
at p. 31.
18 C. B. 786.
8 E. & B. 647.

In *Smout v. Ilbery*, however, a wife who had had authority to contract for her husband, entered into a contract on his behalf after his death, of which she was ignorant. It was held that she was not liable, the revocation of her authority, of which she was ignorant, having been by act of God.

10 M. & W. 1.

An important question arises as to whether it is essential to his liability that the defendant should have intended the plaintiff to act on the statement, that is to say, how far the third ingredient, noticed on page 259, is to be carried.

The intention
that plaintiff
should act on
the statement :

In *Tapp v. Lee* the defendant apparently intended his statement as a joke, because on hearing of what had occurred he remarked: "I did not think you was such a cake (dupe)." The Court assumed that this statement was material as shewing his intention thereby to obtain credit for his friend, that is, an intention that the plaintiff should act on it. But although material as proving fraud, it is not essential; because the absence of an intention to injure, as we have seen, does not affect the defendant's liability. As in all other cases, the test is whether the defendant as a reasonable man should have foreseen the plaintiff's act as a probable consequence of the statement, or whether the plaintiff himself acted as a reasonable man in believing the statement, and this whether the statement was intended as a joke or not.

(3 B. & P. 367.)

e.g., as to a
statement
made in joke,

tested by the
conduct of the
reasonable
man.

No liability to those to whom the statement is not addressed,

[*ante*, p. 230.]

L. R. 6 H. L. 677.

unless direct communication to them is shewn.

18 C. B. 903.
4 H. & M. 338.

Example of communication between speaker and others to whom statement not originally made.

But the Courts have held that a reasonable man will not expect people to act on the faith of his false representation other than those to whom it is made expressly, or impliedly as through the medium of another person. This was decided in *Langridge v. Levy*, a case we have already discussed on another ground. And the same point was decided in *Peek v. Gurney*, where the House of Lords held that a person who has bought shares on the market on the faith of false statements contained in the original prospectus, has no cause of action against those who issued it, unless he can shew some direct connection between them and himself in the communication of the prospectus. Lord Chelmsford refused to adopt the cases of *Bagshawe v. Seymour*, and *Bedford v. Bagshawe*.

There seems however to be a very important distinction between these cases, which rests on the nature of a prospectus. The head-note to *Peek v. Gurney* puts the point very plainly. "The proper purpose of a prospectus of an intended company is to invite persons to become allottees of the shares, or original shareholders in the company. When it has performed this office it is exhausted." The facts of the case seem to have been that neither the original prospectus (nor the advertisements of it) were seen by or were sent to the plaintiff; but that some time afterwards one of them fell into his hands, and on the faith of the statements contained in it he bought some shares in the open market. Lord Chelmsford said expressly that the plaintiff bought the shares upon the faith of a prospectus which he had not received from those who were answerable for it. The false statement was therefore not of so wide a character as the one in the *Bagshawe* cases. There it was made expressly to the Stock Exchange committee in order to obtain from them another statement (which was practically therefore the defendant's statement) which was, from its nature, to be made to the public, not once, but for all the time the concern was going. And again, although the absence of intention to injure is not material, yet, as we have seen, the presence of that intention is of

itself almost sufficient to establish fraud ; and the intention to induce the plaintiff as one of the public to do what in fact he did was apparent. Lord Chelmsford's distinction of *Scott v. Dixon* from the Bagshawe cases points to this principle. In that case the plaintiff had bought shares upon the faith of a report made by the directors *to the shareholders* which contained false representations that the profits of the company were sufficient for payment of the dividend, and that the shares were a safe investment for the money. But copies of this report were left at the bank, and were to be had by sharebrokers or any persons applying for it, who were desirous of information with regard to the affairs of the bank, with a view to the purchase of shares. On this ground the Queen's Bench thought the plaintiff entitled to judgment. In *Gerhard v. Bates* the plaintiff also recovered, having bought shares on the faith of the original issue of the prospectus, which contained false statements. 29 L. J. Ex: 62 n. 2 E. & B. 476.

The case of *Peek v. Gurney*, beyond establishing what are the proper functions of a company's prospectus, seems to point to a principle noticed by Mr. Bigelow, that a representation, whatever be its nature, cannot be supposed to continue for ever ; but that there is a reasonable time within which the plaintiff must act upon it so as to be able to rely upon the fraud. [ante, p. 264.] [Leading Cases, p. 41.] A representation does not continue for ever.

It is clear that where a representation as to the credit of another is made, the truth or falsehood of the statement must be judged by the state of that credit at that time.

With regard to these cases it is only necessary to add that "this species of action was dexterously intended to avoid the Statute of Frauds" (Gibbs, C.J., *Ashlin v. White*) ; an anomaly which was rectified by Lord Tenterden's Act (9 Geo. IV. c. 14, s. 6), which provided Application of Lord Tenterden's Act. Holt, N. P. 387.

"That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given

concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

(iii.)

To the third class of cases, in which a contract with the party making the statement has been induced by it, the same broad rules apply.

Warranty.

[cf: notes to
Chandelor v.
Lopus, in Smith's
Leading Cases.]

The question not unfrequently arises whether a statement made at the time of entering into a contract amounts to a warranty: "The rule of law being that every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended." This point, however, is beyond our present purpose.

1 Sm: L. C.
183 [8th ed:].

In the leading case of *Chandelor v. Lopus* the defendant sold to the plaintiff a stone, which he affirmed to be Bezoar stone, but which proved not to be so. It was held that no action lay against him unless he either knew that it was not a Bezoar stone, or had warranted it to be a Bezoar stone (1).

The rule as to deceit usually drawn from this case is that it is necessary for the plaintiff to aver *scienter*. But the meaning of the *scienter* has been explained in the notes to the case in Smith's Leading Cases, and will be found to correspond with what we have already advanced.

Other remedies where contract induced with person making statement.

When, however, we come to contracts induced by the fraud of one of the parties to it, there are, as we have said, other remedies beyond the action for deceit. That action would naturally only be made use of to recover damages incurred in the

4 M. & W.
651.

(1) So in *Ormrod v. Huth*: there had been a sale of cotton by sample with a representation that the bulk corresponded with the sample, but no warranty. The cotton was in fact of an inferior quality, but it had been falsely packed by the consignor, and the seller was ignorant of this; he in fact believed in the truth of his statement. It was held that no action for false representation would lie, but that the maxim *caveat emptor* must apply.

execution of the contract. The party deceived is allowed however to bring a suit for rescission of the contract, or to defend successfully an action for specific performance or for damages for non-performance. These remedies do not concern our study of the Law of Torts. It is interesting however to note that with regard to these remedies introduced by this third class, knowledge of the fraud entirely disappears, on the principle that a person is not allowed to retain a benefit which he has received in consequence of an error of his own, however innocently committed.

Knowledge of fraud disappears.

It is, perhaps, somewhat of an anomaly that this rule should not extend to all the remedies in respect of the contract: but this arises out of the peculiar nature of the common law remedy by action for *deceit*. We have already discussed what amounts to absence of knowledge; anything that falls short of this comes in the view of the common law within the category of an unintentional act, that is to say, an unintentional fraud, for which no liability attaches. This distinction in principle has been repeatedly pointed out (see Cotton, L.J., in *Arkwright v. Newbold*). The most recent case on the subject is *Redgrave v. Hurd*, which was an action for specific performance of an agreement to purchase a business: the defence alleged a fraudulent misrepresentation as to its value, and there was a counter-claim for damages incurred by the defendant in consequence of the fraud. Jessel, M.R., said: "As regards the defendant's counter-claim, we consider that it fails so far as damages are concerned, because he has not pleaded knowledge on the part of the plaintiff that the allegations made by the plaintiff were untrue, nor has he pleaded the allegations themselves in sufficient detail to found an action for deceit." With regard to rescission, "according to decisions of the Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One

17 Ch: D., at P. 320.
20 Ch: D. 1.

Principle explained by Jessel, M.R.

way of putting the case was : ' A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false ; he ought to have found that out before he made it.' The other way of putting it was this : ' Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency : no man ought to seek to take advantage of his own false statements.' The common law rule was said not to have been quite so wide : the statement at least " must have been made recklessly and without care, whether it was true or false, and not with the belief that it was true." It is presumed that the equity doctrine now prevails in all Courts.

The question most frequently arises in company cases, the fraud being misstatements in the prospectus issued by the directors. The law on this subject may be shortly stated as follows : the action for deceit lies against all personally who have assisted in the issuing of the prospectus : the company is responsible for the fraud to the extent they have benefited, or are likely to benefit, under the above rules. This question has been discussed under the head of liability of principals for the torts of their agents ; and the question whether the action for deceit will lie against the company has also been discussed under the head of corporations as tortfeasors.

[*ante*, p. 53.]

[*ante*, p. 45.]

It is sufficient for our purpose to refer to this principle : the further examination of it falls within the Law of Contract.

No distinction
between legal
and moral
fraud.

3 Ex: D. 243.

It will be noticed that we have ignored the distinction between legal and moral fraud sometimes drawn. " I am of opinion," said Bramwell, L.J., in *Weir v. Bell*, " that to make a man liable for fraud, moral fraud must be proved against

him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shewn and correlative right, and some violation of that duty and right. And when these exist, it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty." In truth, we are discussing the legal aspect of a moral question, and, as we have seen, the common law does practically adopt the same standard as morality. The apparent exception, to which the name "legal fraud" is sometimes attached, is the liability of the principal for the fraud of his agent. But this may be rested on another moral ground. His claim to take advantage of his agent's fraud is in itself moral fraud.

The standard of legal fraud is practically the same as that of morality.

[cf. p. 63.]

There are only two other points to be noticed as to what amounts to a false representation. It was said by Lord Chelmsford in the *Directors of the Venezuela Ry. Co. v. Kisch*, that "in an advertisement some allowance must always be made for the sanguine expectations of the promoters of the adventure, and no prudent man will accept the prospects which are always held out by the originators of every new scheme, without considerable abatement." Then, as to non-disclosure of material facts. Lord Cairns said in *Peek v. Gurney*: "Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

L. R. 2 H. L. 99.

A certain amount of "puffing" allowed.

Non-disclosure of material facts
L. R. 6 H. L. at p. 403.

must be such as to make what is said false.

This rule will be found consistent with *Mackay's Case* and [ante, p. 63, 64.] *Barwick's Case*, already discussed.

The question as to the necessity of damage to the plaintiff requires some little consideration.

3 Bulstr: 95.
In fraud
damage must
be shewn.

[ante, p. 259.]

It was said by Cooke, J., in *Bayly v. Merrel*, that fraud without damage, or damage without fraud, will not found an action: but where both concur an action will lie: and this was approved in the leading case of *Pasley v. Freeman*. This rule is sometimes stated in another form, that no action can be brought for a bare lie.

Recapitulation
of general
principle of
damage.

Without going over a second time what we have already said on the subject of damages, it will be necessary to refer to two features of the principles there discussed, namely, that damage is always an essential in an action of tort: that damages compensate (as a rule) the plaintiff for the damage he has suffered: that where the damage is infinitesimal nominal damages are given: that where no great damage is proved, but where it is manifest, from the nature of the case, that some small damage *must* have been done, nominal damages are also given: and that in many cases of injury to the person, to the reputation, or to property, the damage (though it exists in the slightest possible degree) is lost sight of, and the establishment of the violated right brought prominently forward: that nominal damages are given in such cases, but that the same principle is really applicable to them, because they are injuries of such a nature that the law presumes the damage for which the nominal damages are given. But it is clear that false representation is not an injury in respect of which the law can presume that damage, even the slightest, must of necessity follow to the person to whom the statement is made; for unless the statement be acted on, it is impossible that damage can follow from the statement. But if it is acted on, and the plaintiff suffer any, even the slightest, damage therefrom, he will be entitled to recover damages in respect of it. In other words, although there is a right under certain circumstances to have the truth spoken, it is not such

There can be
no damage
unless state-
ment acted on.
Therefore law
will not pre-
sume damage.

a right from the violation of which, without express proof of it, the law will assume that damage, however small, must have followed.

With regard to the damage to the person *of* whom the statement is made, that, as we have already said, falls within another branch of the law of torts, namely, Slander ; and, as might be expected, the presumption of damage in such cases is regulated by different principles.

But where the person spoken *of* is the person damaged, the principle of damage must be different.

[*cf.* p. 308.]

CHAPTER IX.

Of Malice.

Malice in law
and malice in
fact.

THE use of the word malice in the law of torts is involved in not a little ambiguity. The distinction between legal fraud and moral fraud does not, as we have seen, exist. But malice has unfortunately always been split up into legal malice and moral malice, or what is the same thing, malice in law and malice in fact. The distinction has led to a great deal of unnecessary confusion, and it will be advisable to explain at once what is meant by malice in law, so as to clear the way for the study of the legal recognition of malice in its popular sense.

In malice in law the frame of mind in which the act is done entirely disappears, except so far as it is necessary to consider it in order to establish the fact that the act was intentional.

Definitions of
malice in law.

The most familiar instance of this is the use of the word in criminal law, as in indictments for murder, "with malice aforethought." Malice there means no more than that the murder has been committed intentionally, and that there is no defence, that is, is without just cause or excuse. And this is precisely the meaning of legal malice in a civil sense: an act done intentionally and without excuse, or, as it is usually said, without reasonable or probable cause.

4 B. & C. 247. "Malice," said Bayley, J., in *Bromage v. Prosser*, "in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it

intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, I do it of malice, because it is a wrongful act done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional, and without just cause or excuse." "Malice in the legal acceptance of the word is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another." (Lord Campbell, C.J., *Ferguson v. Kinnoull*.) "Malice in law means an act done wrongfully, and without reasonable and probable cause, and not as in common parlance an act dictated by angry feeling or vindictive motives." (Best, C.J., *Stockley v. Hornidge*.) It applies to all acts whether the injury be to the person, reputation, or property. 9 Cl. & F. 321. 8 C. & P. 11.

The three ingredients then of malice in law are intention to do the act, a wrongful act, and the absence of just cause or excuse for doing it; and these are the three ingredients of all torts; all torts are therefore malicious in law. Being thus a common element of all torts, and the just cause or excuse varying according to the nature of the wrongful act, "malice in law" may be at once dismissed. A great deal of the confusion has arisen from the use of the word malicious in some of the old declarations in cases where actual malice is not an essential ingredient; this will be especially noticed in the cases dealing with the interference with contractual rights. Sufficient has however been said to shew that it is practically a useless term, and there can be little doubt that, if ever codification of the Law of Torts is attempted, it is destined entirely to disappear. The term being however still in use, we are compelled to retain the two terms, malice in law and malice in fact. Malice in law is composed of elements common to all torts, [67: p. 364.] and its use tends only to confusion.

We have however only to consider the legal effect of malice in fact. Legal recognition of malice in fact.

The simplest form which the recognition of malice in fact takes, is in the ordinary tort in which it is not an essential

Ordinary form
is vindictive
damages.

[cf: p. 148.]

In some torts
malice is the
gist of the
action.

Probable ex-
planation why
malice essen-
tial in actions
for wrongful
prosecutions.

ingredient. In such cases the law allows the jury to give vindictive damages if personal spite or ill-will has actuated the commission of the tort, thus fulfilling, on its civil side, its function of punishing wrongdoers.

In some cases, however, actual malice is said to be the gist of the action, as in malicious prosecution. In libel and slander the position occupied by malice is, as we shall see, to rebut or destroy the privilege which arises on certain occasions. An act therefore which would otherwise be justified, ceases to be so when there is present a desire to injure. So in actions against judicial officers, an actually malicious breach of their duties must be shewn: and here again an act, such as erroneous decision, which would otherwise be excused, ceases to be so when there is present a desire to injure.

In malicious prosecution, however, we have at first sight an apparently anomalous state of facts: there are, an intentional act; a wrongful act, and an act without reasonable and probable cause; and damage flowing therefrom: and yet no tort is committed until actual malice becomes an ingredient. The reason may possibly be that the act which has been done, even though it be done without reasonable cause, is in the nature of a duty to the public, and therefore the act is considered privileged even though a mistake is made. As in libel, the absence of truth does not destroy the privilege; so here, the absence of reasonable cause does not destroy the privilege; but in both, malice destroys the privilege. If this is so, the absence of belief in the reasonable cause is important on the ground of malice, just as an absence of belief in libel is important on the same ground.

Beyond these cases, however, personal spite against an individual is not a tort. As we have already said, the essential ingredient of a tort is an intentional act; the absence of an intention to injure affords no excuse, the liability depends on whether the act is wrongful or not. So on the other hand, if there is no wrongful act, the presence of an intention to injure, however pronounced, falls outside the pro-

vince of law. If a crime has been committed I may lawfully bring the offender before the magistrate; it matters nothing that the criminal is my deadly enemy, and that I do so put the law in motion against him from motives of revenge. "The unfair use made of the charge may prove malice, but does not raise any inference of a belief that there was no reasonable or probable cause (*i.e.*, legal malice); for the contrary belief is perfectly consistent with malice." (Lord Denman, C.J., *Turner v. Ambler*.) "A man's motive will not make wrongful an act which is not of itself wrongful." (Jervis, C.J., *Heald v. Carey*.) Therefore it is that, in an action for malicious prosecution, unless the plaintiff can prove that he was acquitted, he must fail absolutely.

There is no remedy for a rightful act done maliciously.

10 C. B., at p. 261.

11 C. B. 977.

To the consideration of this tort we may now proceed.

§ 1. MALICIOUS PROSECUTION.

To entitle the plaintiff to a verdict in an action for malicious prosecution it is essential for him to prove (i.) that he was acquitted; (ii.) absence of reasonable and probable cause in setting the law in motion; (iii.) malice in fact.

Essential ingredients of the action.

(i.) *The plaintiff in the action must have been acquitted.*

We have already pointed out the fundamental rule on which this position rests; there is another reason which is not unfrequently advanced, and one which is frequently to be met with in other branches of the law. The action for malicious prosecution would practically amount to a rehearing on the merits of a case already adjudicated upon. "If such an action should be allowed," said Lord Hale, C.J., in *Van derberg v. Blake*, "the judgment would be blown off by a side-wind" (1).

Reason of rule that plaintiff's acquittal necessary.

Hardr: 194.

(1) That action was against a custom-house officer for seizing goods; and the seizure was determined to be lawful, because the goods were condemned on the seizure as forfeited, by judgment of the proper Court.

3 E. & E. 709. The question was much discussed in *Castrique v. Behrens*; the Court refused to entertain the action because the verdict had been against the plaintiff: "In such an action, it is essential to shew that the proceeding alleged to have been instituted maliciously and without reasonable and probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be, that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another Court, not being a Court of appeal, to hold that the decision was come to without reasonable and probable cause." And again in the House of Lords, in 10 App. Ca: *Metropolitan Bank v. Pooley*, where the Earl of Selborne, C., 210. said, "An action for a malicious prosecution cannot be maintained until the result of the prosecution has shewn that there was no ground for it. And it is manifestly a matter of high public policy that it should be so; otherwise the most solemn proceedings of all our courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind."

And this principle applies to all convictions, summary or otherwise, and whether there is a power of appeal or not: L. R. 2 C. P. *Baseb v. Matthews*. 684.

(ii.) *The prosecution must have been undertaken without reasonable and probable cause.*

Importance of rule as to absence of reasonable and probable cause.

As we have already pointed out, absence of reasonable cause and excuse for the commission of the act is the ingredient in all torts; the form which it takes in actions for malicious prosecution is that given in the heading; its prominence in this tort arises from the rule of evidence which

we shall have to consider, that the burden of proof is on the plaintiff.

It is evident that we are again brought face to face with the reasonable and prudent man. In *Broad v. Ham*, Tindal, C.J., said that "in order to justify a defendant there must be reasonable cause—such as would operate on the mind of a discreet man; there must also be probable cause—such as would operate on the mind of a reasonable man, at all events such as would operate on the mind of the party making the charge, otherwise there is no reasonable cause for him." 5 Bing: N. C. 725.

But we have here an apparent anomaly, the determination of what is reasonable and probable cause is said to be a question of law, or at least is a question to be determined by the judge and not by the jury. There has been no question since the decision of the Exchequer Chamber in *Panton v. Williams* as to this being the law. The judgment of the Court was in the following terms: "Upon this bill of exceptions, we take the broad question between the parties to be this; whether in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury and the abstract question of law to the judge? And we are all of opinion that it is the duty of the judge so to do." The real difficulty is to trace this distinction with the necessary clearness. "There have been cases," continued Tindal, C.J., "in the later books which appear at first sight to have somewhat relaxed the application of the rule, by seeming to leave more than the mere question of the facts proved to the jury: but upon further examination, it will be found that, although there has been an apparent, there has been no real departure from the rule. Thus, in some cases, the reasonableness and probability of the ground for prosecution

It is said to be a question of law.

2 Q. B. 169.

The facts are for the jury, the abstract question of law for the judge.

Forms which the question of fact takes,

has depended, not merely upon the proof of certain facts, but upon the question, whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted : again, in other cases, the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not : in other cases the enquiry has been, whether from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant are really so many additional facts for the consideration of the jury : so that in effect, nothing is left to the jury but the truth of the facts proved, and the justice of the inference to be drawn from such facts ; both which investigations fall within the legitimate province of the jury ; whilst, at the same time, they have received the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution, or the reverse."

The conduct of the reasonable man appears to be left to the judge :

L. R. 4 H. L. at p. 535.

but in fact it is left to the jury.

It would be difficult to find a more lucid attempt at distinguishing between the province of judge and jury ; but we have still this difficulty that the conduct of the reasonable man is left, not only in simple cases, but also in complicated ones, to the judge : and that he does not speak in this case, as in some cases of negligence, from his own experience, or from his knowledge of facts which everybody knows. It is left to him as a question of law. Lord Chelmsford, in *Lister v. Perryman*, intimated his opinion that it was called a question of law merely to emphasise the point that it is a question for the judge : " In what other sense," he said, " it is properly called a question of law I am at a loss to understand."

The expression however seems fully warranted ; and indeed the conduct of the reasonable man is virtually left to the jury. This question was gone into at some length by Mr.

Justice Cave in a very luminous summing up in the recent case of *Abrath v. North Eastern Ry. Co.* The two questions which he put to the jury explain of themselves this somewhat complicated question: "First, did the defendants take reasonable care to inform themselves of the true state of the case? Secondly, did they honestly believe the case which they laid before the magistrates?" "If," continued the learned judge, "both questions are answered in the affirmative, that they did take reasonable care, and that they honestly believed the case they laid before the magistrates, that is a verdict for the defendants" (1). All the questions comprised in Chief Justice Tindal's judgment are in fact condensed into these two, and it is clear that the defendant's conduct as measured by the prudent man's conduct, is left not to the judge but to the jury. What then is the question of law for the judge? It would certainly appear to be comprised in this short sentence: If the defendant has taken reasonable care to inform himself of the facts of the case, and if he believed in those facts, he has acted as a reasonable man and is entitled to judgment. But is this a sound position? Does it follow as a matter of course that because a man takes reasonable care to inform himself of the facts of the case, therefore the case is one in which it is reasonable and proper for a man to proceed criminally? May he not, however careful he has been, still be ignorant of facts which alone would make the proceeding a reasonable and proper one?

11 Q.B.D.
440.

What is the
question of
law?

Is it proper
to proceed
criminally
simply because
he has made
reasonable
enquiries?

It seems abundantly clear that this position practically shelves the difficulty, and that it is not the judge but the jury who find the reasonableness of the proceeding. This has been evidently present to the minds of judges before. In *Hicks v.*

(1) "I think the material thing for you to examine about is, whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves—did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do, they are misled, because people are wicked enough to give false evidence, nevertheless they cannot be said to have acted without reasonable and probable cause."

8 Q.B.D. 167. *Faulkner* an elaborate judgment was delivered by Hawkins, J., which concludes as follows: "It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause—one by the jury and another by the judge, but such at present is the law." The last element which the learned judge said was a question of fact for the jury was, "fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused." It must be confessed this is very nearly allied to the question which is said to be for the judge. The result of the judgment however would seem to be this, that it does not follow as a matter of course that because the jury find reasonable cause, therefore there was reasonable cause; that although the jury find every element to exist and they themselves have practically found reasonable cause, yet the judge may still find absence of reasonable cause. If this is true the position deducible from *Cave, J.*'s summing up is untrue, and we are as far off as ever from the true solution of the difficulty.

The question for the judge is, Was there reasonable cause to prosecute?

The rule that the question of reasonable and probable cause is a question for the judge seems capable however of explanation on other grounds. When every element is found by the jury, either in the elaborate series of questions given by Hawkins, J., or in the condensed ones by *Cave, J.*, it is clear that the question whether the defendant has fulfilled his duty by coming up to the standard of the prudent man's conduct has practically been submitted to the jury. But there is one element in his conduct which the jury cannot determine. With all the facts or elements found in his favour, there is still another which must also be in his favour before he is entitled to a verdict: Was there reasonable cause to prosecute? was there such a case as would warrant a reasonable man in believing that the magistrate would commit for trial? And this is eminently a question for a lawyer to determine. The question need not be put so high as this, Would a

lawyer believe the magistrate would commit? But it seems fair to put it to this extent, Was there a reasonable *case* to take to the magistrate? This seems to be warranted by the statement of law as to the province of the judge, as to which no doubt exists, and it seems to keep the functions of judge and jury perfectly distinct. Granted the defendant's conduct came up in every respect of which the jury are the arbiters, to the standard of the prudent man: granted that he acted with reasonable care in ascertaining the facts of the case: there is still this further point to be determined, Were those facts such as would make it probable that the case would be determined adversely to the person accused? In other words, the jury is to determine whether the defendant made all the enquiries a prudent man should make, the judge is to determine whether *the result of those enquiries* would justify a prudent man in proceeding criminally. And this second question the law says must be determined by a lawyer, that is to say, by the judge.

It is this consideration which makes the taking of counsel's opinion by the prosecutor so important.

As a general proposition it may be said "that if a party lays all the facts of his case fairly before counsel, and acts *bonâ fide* upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action" for malicious prosecution. (Bayley, J., *Ravena v. Macintosh*.) A further question as to malice in fact may of course arise on this point; but on the simple fact that counsel's opinion has been taken on facts laid fairly before him (a question for the jury), it is clear that the jury would find that the defendant had acted with the care to be expected of a reasonable man; and the judge would hardly be warranted in finding absence of reasonable and probable cause for the prosecution.

But beyond the reasonable care required of a man, the question for the jury; and beyond the existence of reasonable and probable cause, the question for the judge; there

Where counsel's opinion has been taken, both questions are answered in defendant's favour.

2 B. & C. 693.

But it must be acted upon *bonâ fide*.

Further, prosecutor must have believed in the case.

Must believe
in the reason-
able cause.

[*ante*, p. 281.]

Province of
judge.

is a further question for the jury to decide; did the plaintiff honestly believe in the case he laid before the magistrates? If the prosecutor did not believe the facts on which he has acted, or which he has submitted to counsel, a question that must very frequently arise where the facts have been reported to him, it is clear that it would be impossible for the jury to find that he acted as a reasonable man. But the question then arises, what must be the extent of this belief? May it be only belief in the facts, or must it be belief in the reasonable and probable cause? As we have already said, it would appear from *Hicks v. Faulkner*, that the belief must extend to this probable cause. If this is so, it serves to emphasise in a very marked manner the true distinction between the respective provinces of judge and jury. "There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based on reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe." This seems to be a most accurate analysis of the belief which the jury are to test. That is to say, the accuser must as a reasonable man believe that there is a reasonable and probable cause that the person he accuses is guilty. But, and herein, with the greatest submission to the learned judge, we venture to think lies the duty of the judge, "fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused." That is, reasonable in the mind of the judge, and not to the minds of the jury.

(iii.) *Malice in fact must be shewn.*

In addition the proceedings must have been taken maliciously, the malice being, as we have already said, what the

word is popularly understood to mean. "The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact—*malus animus*—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody."

(Hawkins, J., *Hicks v. Faulkner*.) Without going into an elaborate analysis of what constitutes malice, it is almost sufficient to point out that the question is left to be dealt with by the jury, the form in which the question is put to them indicating the smallest measure of improper motive which in the eye of the law would constitute malice in fact: "Was the defendant actuated by any indirect motive in preferring the charge against the plaintiff?"

Actual malice must also be proved.

8 Q.B.D. 157.

Malice equivalent to indirect motive.

From what we have already said on the necessity for the defendant's belief in the case, it is apparent that if the jury negative this belief, the presence of malice or indirect motive would be affirmed almost as a matter of course. Therefore it is, that even where counsel's opinion has been taken, the jury must still be asked whether that opinion was *bonâ fide* acted on. (Bayley, J., *Ravenga v. Macintosh*).

2 B. & C. at p. 697.

It may be useful by way of illustrating the above principles to state shortly the facts of one case. We will take the most recent one, that of Dr. Abrath. The plaintiff, a surgeon, had attended McMann for bodily injuries alleged to have been sustained in a collision upon the North Eastern Railway. McMann brought an action against the company, which was compromised by the payment of a large sum of money. Subsequently the directors, having received certain information, caused the statements of certain persons to be taken by a solicitor; these statements tended to shew that McMann's injuries had not been caused by the collision, but were produced wilfully by Dr. Abrath, with the consent of McMann, for the purpose of defrauding the defendants. These state-

Facts in *Abrath v. North Eastern Ry. Co.*

ments were laid before counsel, who advised that there were good grounds for prosecuting both Abrath and McMann for conspiracy. They were prosecuted, and were acquitted. The jury found that the directors had exercised reasonable care in ascertaining the facts of the case, and that they honestly believed the case laid before the magistrate; and that consequently they did not act from any improper motive in preferring the charge.

Plaintiff must prove the facts, also all subordinate facts which are their component parts.

The important point discussed in the arguments in the Divisional Court and the Court of Appeal, was the extent of the rule that the plaintiff, in order to establish his case, is bound to prove all the elements of this ground of action which we have been considering; that is, to shew that he was acquitted, absence of reasonable and probable cause, and presence of malice. The burden of proof of the whole of these three fundamental facts is on the plaintiff, if he fails in making out any one of them, he fails in proving what is necessary to support his claim. And as he must prove all the major propositions, so he must prove all the minor propositions which are its component parts. Now one of these minor propositions, is, as we have seen, whether reasonable care has been taken to ascertain the facts. The Court of Appeal decided after an elaborate argument, that it was for the plaintiff to shew that this reasonable care had not been taken; and that the burden of proving that reasonable care had been taken did not fall on the defendant.

Burden of proof after *prima facie* case.

A somewhat nice question arises on whom the burden of proof falls after the plaintiff has proved a *prima facie* case; the Court decided that in this case the burden of proof is not shifted entirely on to the defendant. Brett, M.R., said, "The proposition ought to be stated thus: The plaintiff may give *prima facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have

to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer; if they are they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff, they must find for the defendant. Then comes this difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.”

The onus laid on the plaintiff of proving his case is in this instance an exceptionally hard one, because, beyond the fact of prosecution and acquittal, he may be entirely in the dark as to what steps the defendant took; it becomes therefore of great importance to ascertain what amounts to a *prima facie* case based on all the fundamental facts which it rests on him to prove.

What amounts to a *prima facie* case.

As we have seen, an acquittal is only one of the facts and sheds no light on the others: thus an acquittal for want of the prosecutor's appearing to give evidence when called, will not prove either an absence of reasonable and probable cause, or malice (*Purcell v. McNamara*): because the prosecutor may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. This would seem to be the general rule, unless the plaintiff can prove circumstances attending the abandonment of the prosecution which throw some light on the defendant's motives in starting it. In *Nicholson v. Coghill* a voluntary discontinuance within a very short time after the arrest was held sufficient to shew a *prima facie* case of malice and of absence of reasonable and probable cause.

Acquittal for want of prosecution insufficient.

9 East 361.

4 B. & C. 21.

And in *Willans v. Taylor*, two bills for perjury against the plaintiff were thrown out by the grand jury. The defendant afterwards preferred another which was found, he himself giving evidence. But when the trial came on, although he was in Court, he absented himself at the moment he was about to be called. "We must infer," said Tindal, C.J., "therefore, that he had some knowledge which he did not desire to disclose; and his conduct on the occasion is sufficient *primâ facie* evidence of want of probable cause to throw it on him to prove affirmatively in the present case that he had probable cause."

As we have already said, malice in fact, however strong, is not of itself *primâ facie* evidence of want of probable cause; nor, on the other hand, is want of probable cause equivalent to malice, unless the jury choose to think so. (Patteson, J., *Mitchell v. Jenkins*.)

Damage not
presumed.
5 B. & Ad:
595.
5 Taunt: 187.

The action for malicious prosecution is not one in which the law presumes damage (*Byne v. Moore*), probably from the fact that its fundamental element is the acquittal of the plaintiff, the person accused; and that it is impossible to assume that damage has flowed from the mere fact of a man having come harmless through a criminal prosecution. But if it be proved that damage to person, reputation, or property have followed, then it may be recovered. "There are three sorts of damages resulting from a malicious and unfounded indictment, any of which would be sufficient to support an action: the damage to a man's fame, as if the matter whereof he is accused is scandalous; where a man is put in danger to lose his life, limb, or liberty; the damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused.

1 Raym: 378. (*Holt, C.J., Savile v. Roberts*.)

"Maliciously
setting the law
in motion;"

An action may be brought in respect of the damage which may accrue from the malicious setting in motion of any

process of law. The term Malicious Prosecution is a convenient head under which to group all such actions ; the more accurate title for the whole group is however "maliciously setting the law in motion," this including every form of legal process, or arrest, which, when being set in motion against a person, is capable of producing damage.

Thus an action may be brought for maliciously and without reasonable and probable cause presenting a petition in bankruptcy against a person, or a petition to wind up a company. In these cases the same rules apply as in malicious prosecution. Therefore such an action will not lie at the suit of an undischarged bankrupt : *Metropolitan Bank v. Pooley*.

From this, however, we must exclude civil suits, because no damage to person or reputation could accrue from it, but only damage to property in the expenses incurred in defending the suit, which the law itself provides for in the rule as to costs following the event.

e.g., bankruptcy or winding-up petitions.
[*cf.* p. 138.]

10 App: Ca: 210.

But not as to civil suits. .

§ 2. MALICIOUS ABUSE OF PROCESS.

A kindred action to the one for malicious prosecution is that for maliciously abusing the process of the Court ; that is to say, for taking, after the law has been set in motion, some unnecessary step in the action to the detriment of the opposite party. In *Heywood v. Collinge* it was held that the plaintiff must shew malice, as that the defendant had proceeded "from motives merely vexatious, and without any reasonable expectation of advantage to himself." The absence of reasonable and probable cause may, under certain circumstances, as in malicious prosecution, be sufficient proof of malice. (Lord Denman, C.J., *Saxon v. Castle*.) An important difference, however, exists between the two cases ; in an action for abusing the process of the law by applying it to extort property from any one, and to effect an object not within the scope of the process, "it is immaterial whether the suit which that process commenced has been determined or

Maliciously abusing process of the Court.

9 A. & E. 268.

6 A. & E. 652.

Reasonable
and probable
cause.

4 Bing: N. C.
212.

After judg-
ment in the
suit plaintiff
estopped from
denying its
accuracy.

L. R. 2 Ex: 15.

not ;" and it does not rest on the plaintiff to shew that it was sued out without reasonable and probable cause : *Grainger v. Hill*. But if the suit, in which the process has been made use of, has terminated in a judgment against the plaintiff (the defendant in the original suit), he is stopped from denying the correctness of that judgment, and consequently until it is set aside or rectified, he cannot maintain this action. Thus in *Huffer v. Allen* the defendant had issued a writ of summons against the plaintiff specially indorsed for £28 : he did not appear to the writ, but paid £10 on account. Judgment was signed however for the full amount, and under a *ca. sa.* the plaintiff was arrested. The Court held that he could not attack any of the defendant's proceedings without also attacking the judgment, and this he could not do, and consequently that his action must fail.

Of Injuries in General.

UP to the present time we have examined principles of general application to the Law of Torts irrespective of the particular right violated. We have also dealt with the defendant's liability for his acts considered by the light of the state of mind in which those acts are committed. But negligence, fraud, malice, may be productive of damage to person, to reputation, or to property. And we now propose to examine the same question of liability from a different point of view, namely, that of the damage sustained by the plaintiff, according as the consequences of the defendant's act affect the plaintiff's rights to person, reputation, or property. In other words, having ascertained the circumstances under which an act must be committed in order to render the actor answerable for the consequences of his act, we are now about to examine the consequences themselves, to measure the results; and, the defendant's state of mind having determined the question as to the existence of his liability, to see what in fact amounts to a tort.

CHAPTER X.

Of Injuries to the Person.

THE well-known torts comprised under this head are assault, battery, and false imprisonment. The right violated is generally the right to the person, which is a convenient form of expression for the aggregate of three distinct rights, namely, the rights a person possesses to the enjoyment of his life unimpeded and unharassed, of his limbs and bodily health uninjured, and to freedom of motion from place to place at his pleasure.

Component
parts of right
to the person.

§ I. ASSAULT AND BATTERY.

Definition of
assault.

An assault properly speaking, is constituted by the assumption of an attitude productive of terror to another person without any actual contact: when there is contact the offence becomes battery. The two are however closely united, and it is convenient to take them together. But since a blow is not a necessary ingredient to an assault, it becomes very important to determine what amount of terrorism the law will take cognisance of. The accepted test is the one laid down by 4 C. & P. 349. *Tindal, C.J., in Stephens v. Myers*, in which the facts were these: The plaintiff was chairman of a parish meeting; the defendant having been very vociferous, a motion was made and carried by a large majority, that he should be turned out. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched towards him; he was, however, stopped by the churchwarden,

who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to reach the plaintiff; but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman. Tindal, C.J., in his summing up to the jury said, "It is not every threat, when there is no actual personal violence, that constitutes an assault; there must in all cases be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped. Then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise, you must find it for the plaintiff, and give him such damages as you think the nature of the case requires." The jury found for the plaintiff with one shilling damages.

Test is, would the blow have been struck if it had not been prevented?

The cases afford numerous other examples of such assaults, and in all of them stress has been laid upon the intention to strike and the present ability to carry the threat into execution. Thus, in *Read v. Coker* the defendant and his servants surrounded the plaintiff, who had refused to leave their workshop, and threatened to break his neck. And in *Martin v. Shopper* the defendant rode after the plaintiff so as to compel him to run into his garden for shelter to avoid being beaten. In both cases an assault was held to have been committed. The presenting of a pistol at a man's head has given rise to some conflicting decisions as to whether it amounts to an assault if it is unloaded. In *R. v. St. George*, Parke, B., said that his idea was that it was an assault to present a pistol at all, whether loaded or not. That if it had the appearance of

Ability to carry out threat must be present.

13 Q. B. 850.

3 C. P. 373.

Presenting unloaded pistol.

9 C. & P. at p. 493.

being loaded, and the action put the other party in fear and alarm, that was what the law intended to prevent. In spite of the contrary dictum in *Blake v. Barnard* this would appear to be accurate, because the right to the unharassed enjoyment of life is violated by the alarm the defendant's action has caused, and the fact that the plaintiff had no cause for his alarm, if he had no means of ascertaining whether it was unfounded or not, must be perfectly immaterial. The test of the assault is the same as in the case where it was necessary to shew that contact was probable; therefore if a pistol is presented which appears to be loaded, and so near as to produce danger to life if the pistol had in fact been loaded and had gone off, that amounts to an assault.

No assault if plaintiff can judge that it will be not committed.

1 Mod: 3.

But if, on the other hand, the plaintiff has a means of judging whether the pistol is loaded, as, for instance, if he had seen the cartridge withdrawn, then his alarm is groundless, and there is no assault. And so, if the person presenting it adds words that it is not his intention to fire it, or that he will not fire it unless the plaintiff do something else, then also it would seem that the alarm is groundless, and that there is no assault. (*Blake v. Barnard*, where the defendant said, "If you are not quiet I will blow your brains out.") This latter point rests also on the ground that, subject to what has been already said, unless there be intention to commit a battery there is no assault. Thus, in *Tuberville v. Savage*, where the plaintiff put his hand on his sword and said, "If it were not assize-time I would not take such language from you," the Court held there was no assault, because it was evident from the words used that there was no intention to commit either assault or battery, and that consequently it would be unreasonable for the person addressed to be in fear of being struck. "The intention and the act make the assault. Therefore, if one strike another upon the hand, or arm, or breast, in discourse, it is no assault, there being no intention to assault. But if one, intending to assault, strike *at* another and miss him, this is

an assault. So, if he hold up his hand against another in a threatening manner, and say nothing, it is an assault."

We have here, therefore, an instance of the existence of a tort depending, partly at least, upon the intention to commit it. On reflection this will be seen not in any way to clash with what has already been said on the subject of intentional acts, that so long as the act is intentional the intention to injure is immaterial. In the case of an assault there must be, as in all other cases, an intentional act before the act can become a tort: and as in all other cases the intention to injure is immaterial. But something more is required, and that is, more correctly speaking, an intention to commit a *battery*; an intention which must be apparent, or the plaintiff at least must as a reasonable man have anticipated bodily harm. Being a reasonable fear, the law allows him to recover compensation in respect of it. If the fright be serious and the plaintiff has needed medical assistance, this can be recovered as special damage.

The tort depends partly on the intention to commit it.

But when the assault has terminated in an actual blow, a battery is said to have been committed. The definition of a battery given by Hawkins [Pleas of the Crown, I., c. 62, § 2] is that it "consists in a violent, angry, rude or insolent, striking or touching of a person either by the defendant or by any substance put in motion by him."

Assault ending in blow is battery.

In the judgment in *Tuberville v. Savage*, given above, an instance is given of a striking of a person in the course of conversation, which would not be held to be a battery. So in *Cole v. Turner*, Holt, C.J., upon evidence in trespass for assault and battery, declared, "First, that the least touching of another in anger is a battery. Secondly, if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery. Thirdly, if any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to such degree as may do hurt will be a battery." Other examples of what amounts to a

[ante, p. 292.]

6 Mod: 149.

Definition of battery.

Examples.

battery are to be found in the following cases: "Such a
 3 M. & W. 28. seizing and laying hold as are necessary to restrain (*Rawlings*
 6 Mod: 172. v. *Till*); spitting in the face (*R. v. Cotesworth*); throwing
 over a chair or carriage in which another person is sitting
 7 Taunt: 698. (*Hopper v. Reeve*); throwing water over a person (*Pursell v.*
 8 A. & E. 602. *Horn*); striking a horse so that it bolted and threw its rider
 1 Mod: 24. (*Dodwell v. Burford*); the removal of a person from one part
 of a prison to another part in which he could not be legally
 4 Ex: 729. confined (*Cobbett v. Grey*); cutting off a pauper's hair, even
 for the sake of cleanliness and according to the rules of a
 4 C. & P. 239. workhouse (*Forde v. Skinner*); a constable taking a person by
 2 B. & P: N. the collar (*Wiffin v. Kincard*). On the other hand, in this
 R. 471. last case it was said that there would be no battery if the
 constable had merely touched the plaintiff with his staff in
 4 H. & N. 478. order to attract his attention: and so in *Coward v. Baddeley*
 it was ruled that a person cannot justify giving another into
 custody for merely laying hands on him to attract attention,
 provided it be not done hostilely nor with violence.

These cases furnish a sufficient explanation of the legal meaning of battery.

We have next to inquire what amounts to a justification.

Justification
of self-defence.

First, the assault is justifiable if it is committed in self-defence; this in the old law phraseology is the defence *son assault demesne*.

11 Ex: 68.

The rule as to this was laid down in *Dean v. Taylor*: "In an action for assault and battery to which the defendant pleads that the plaintiff first assaulted the defendant, who thereupon committed the alleged assault in his own defence, the plaintiff may shew that although he struck the first blow the defendant was guilty of excess. This principle is very concisely stated in the questions left by Parke, B., to the jury:

But must be
molliter manus
imposuit.

"Which of the parties struck the first blow? did the defendant use more violence than was necessary to defend himself?" The old form of the defendant's plea—*molliter manus imposuit*—shews also the full extent to which the law allows a

man to defend himself even from an unprovoked assault. And the same rule applies to ejectment of a trespasser by the person in possession of property, or the recovery of property from a person wrongfully in possession by the owner; he must first request him to depart and then he may remove him, but only by gently laying hands upon him: if he is then resisted it would seem that he in his turn may use sufficient force to overcome the resistance. The defendant ought not in the first instance to begin with striking the plaintiff, but the law allows him either in defence of his person or possessions to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act; so that the battery follows from the resistance." But if only an assault (or apparently contemplated battery) has been committed on the defendant's property (*e.g.*, his horse), he may not even plead *molliter manus imposuit* in defence of his possession, unless there has been something more than a mere attempt to beat him. (Lawrence, J., *Weaver v. Bush*. 8 T. R. 78.)

And see *Timothy v. Simpson*: The master in that case was, however, held not liable for an assault committed by a shopman in ejecting a customer who refused to leave, he not ordering the assault nor being present during the ejectment. 6 C. & P. 500.

But "possession is nine points of the law:" and although when a man is in possession he may use force to keep out a trespasser, if a trespasser has gained possession the rightful owner cannot use force to put him out, but must appeal to the law for assistance. But the forcible entry under such circumstances is not an assault, because the possession being unlawful he can recover no damages in respect of it; but it is a crime under the statute 5 Rich. 2, stat. 1, c. 8. (1) (*Beddall v. Maitland*.)

Ejectment of trespassers.

17 Ch: D. 174.
[cf: p. 340.]

(1) "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will."

5 Rich: 2,
stat: 1, c. 8.

In connection with this subject the spring-gun cases should be read.
[*ante*, p. 234.]

Justification
by superior
command.

Secondly, the command of a superior may in some cases be a justification. But in this case the defence is only good if it would have been good had the superior himself committed the battery. For instance, if he is in possession of the property. (*Roberts v. Taylor*; *Wheeler v. Whiting*, where the plaintiff was turned out of a house by a policeman.)

1 C. B. 117.
9 C. & P. 265.

Thirdly, a wife may justify an assault in defence of her husband; or a servant in defence of his master (*Leward v. Basely*); and, it would seem, any one in the preservation of the public peace.

1 Raym: 62.

Necessary
correction.

Fourthly, a limited power of correction is vested in certain people having authority over others. Thus in a parent over a child, or a schoolmaster over a pupil (*Fitzgerald v. Northcote*); in a master over his apprentice (*Penn v. Ward*); in a captain over his crew for the preservation of discipline (*Lamb v. Burnett*; *Noden v. Johnson*); in a captain over his passengers, if there is any real appearance of danger to discipline, or if the plaintiff's behaviour is such as might induce a reasonable man to believe in the existence of such danger (*Aldworth v. Stewart*). But the correction must be suited to the occasion and must be moderate.

4 F. & F. 656.
2 C. M. & R.
338.
1 C. & J. 295.
16 Q. B. 218.

4 F. & F. 957.

Justification
of leave and
licence.

Fifthly, the justification may take the form of leave and licence: as where the assault or battery has been committed between parties engaged in a lawful game (*Christopherson v. Bare*); but if the game be unlawful, as prize-fighting, the same rule does not apply, and it would seem that either party may bring an action for an assault and battery against the other (*Bell v. Hansley*); or where permission has actually been given by the person alleged to have been assaulted: as where a patient submits to an operation (*Latter v. Braddell*, where the question was whether a domestic servant had con-

11 Q. B. 473.

3 Jones 131.

50 L. J: Q. B.
448.

sent to be examined by a medical man to see she was with child); for an assault must be an act done against the will of the party assaulted.

Among other injuries to the person may be included injuries to a person's health arising from nuisances. These we have already considered under the leading case of *St. Helen's Smelting Co. v. Tipping*. Nuisances.
[ante, p. 160.]

§ 2. FALSE IMPRISONMENT.

A false imprisonment is an unlawful (wrongful and therefore false) interference with a man's liberty of action or freedom to move at will from place to place. As in assault and battery, there are two degrees of the offence, but they are not as in that case distinguished by different names. There is a restraint upon freedom imposed by a shew of authority in which actual contact is unnecessary, and there is an actual laying on of hands and imprisonment in the popular sense of the word.

In what false imprisonment consists.

The first question to be determined is therefore what amounts to an imprisonment. *Warner v. Riddiford* affords a good illustration. The plaintiff was the defendant's servant at weekly wages to carry on a beerhouse. An altercation arose with regard to the balance of money due to the defendant, and he brought in a superintendent and a sergeant of police, one of whom, on the plaintiff's attempting to go upstairs, refused to permit him to do so, and ultimately only allowed him to go accompanied by an officer. The county court judge's summing up was practically adopted by the Court, and was as follows: "To constitute an imprisonment, it was not necessary that the person should be locked up within four walls, but that, if he was constrained in his freedom of action by another, that was an act of imprisonment; that the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person, by re-

4 C. B. N. S. 180.

What restraint amounts to imprisonment.

fusing him permission to leave the room and go up stairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate; and that there was an act of imprisonment, and a continued imprisonment of some duration, there could be no doubt either in fact or law."

4 Ding. N. C.
212.
Submission
to lawful
authority.

In *Grainger v. Hill* the same question was discussed; and it was laid down that if a party is under restraint, and the officer manifests an intention to make a caption, it is not necessary that there should be actual contact; or that if a person resigns his personal liberty under the authority of a writ, actual contact is not necessary to complete the arrest.

2 B. & P. N.
R. 211.

Any restraint by authority or shew of force therefore constitutes an imprisonment. The doctrine of an earlier case, *Arrowsmith v. Le Mesurier*, that if a constable brings a warrant, but instead of arresting the person charged he goes before the magistrate voluntarily, it does not amount to an arrest, has been expressly dissented from; and the true principle is thus laid down in Buller's *Nisi Prius*: "If the bailiff who has a process against one, says to him, when he is on horseback or in a coach, You are my prisoner, I have a writ against you; upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process."

The freedom of action in these cases has been curtailed or yielded up voluntarily, but it is only a submission to the duly constituted officer of the law: and it is accompanied with the knowledge that if he does not go, he will be compelled to go. Where however the restraint is imposed by an ordinary person, it would seem that it must be actual and absolute, and a voluntary submission except under very exceptional circumstances will not amount to an imprisonment.

7 Q. B. 742.
But there must
be absolute
limits set to
free going and
coming.

In *Bird v. Jones*, a part of Hammersmith Bridge, generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage-way by a temporary fence. The plaintiff insisted

upon passing along the part so appropriated, and attempted to climb over the fence. The defendant, the clerk of the Bridge Company, pulled him back : but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway in the direction in which he wished to go. The plaintiff, however, was at the same time told that he might go back into the carriage-way and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour. The question was whether this partial restraint of the will was sufficient to constitute an imprisonment. The Court were of opinion (Lord Denman, C.J., dissenting) that it was not. To call this an imprisonment, said Coleridge, J., "appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only ; it may itself be movable or fixed : but a boundary it must have ; and that boundary the party imprisoned must be prevented from passing ; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom : it is one part of the definition of freedom to be able to go whithersoever one pleases : but imprisonment is something more than the mere loss of this power ; it includes the notion of restraint within some limits defined by a will or power exterior to our own."

Partial
restraint is
insufficient.

The point shortly therefore is this : to constitute an imprisonment there must be such a restraint as entirely precludes the possibility of a free egress—such an egress as would not amount to a prison-breach—if the plaintiff choose to avail himself of it.

Free egress
in any direc-
tion must be
impossible.

The case of *Bird v. Jones* points therefore to what is a very important distinction, that between imprisonment and

Difference
between im-
prisonment

and obstruction.

[*ante*, p. 253.]

obstruction. The latter may be said to be as much a curtailment of the free liberty of motion as the former: and both are torts, the latter however falls under another head, the violation of public rights, and we have already examined the rules by which it is governed, and the circumstances under which the plaintiff may bring his action: the former might also be large enough to become a violation of a public right. For example, if one end of a street were blocked up unlawfully, there would be an obstruction, but no imprisonment, because of the possible egress at the other end: the plaintiff would have no cause of action unless he could prove special injury. But if both ends were blocked, there would be clearly an imprisonment: and it would seem that the rules as to that tort would override the rules which govern the remedy for a simple obstruction.

Justification
of arrest with
warrant.

[Bigelow, p. 277.]

2 W. Bl: 866.

We have next to inquire what amounts to a justification. First in the case of arrests with warrant. The law on this subject, into which we do not propose to go at any length, may be shortly stated as follows. The officer may, under the statute 24 Geo. 2, c. 44, justify that the arrest was made *bonâ fide* under a legal warrant. If the arrest is made under a process which is *void* the officer is himself liable. This is understood to mean if the writ shew upon its face that it is void; and this may appear in either of three ways: (i.) by a material defect in the language; (ii.) by the whole proceeding being beyond the jurisdiction of the Court; (iii.) by the Court having no power to issue the warrant in the cause in question. In all of these cases the sheriff is liable at common law if he execute the writ, and also the attorney who prepares it, and the client who authorises it: *Barker v. Braham*. But if the arrest is made under a process which is only *voidable* or *irregular* the officer is not liable. This is understood to mean not any irregularity in form which is already dealt with under (i.) above, but that the writ has been granted in an irregular manner in a proceeding from which it might have

been regularly issued; or has been granted regularly in a suit the judgment in which is afterwards set aside.

If the wrong person is arrested, though by a pure mistake, it is a case of false imprisonment, unless the person himself has caused the mistake by his own false representation; but after the discovery of the mistake the officer should not unnecessarily detain him: *Dunstan v. Paterson*.

2 C. B. N. S.
495.

Justification
of arrests with-
out warrant.

Secondly, as to arrests without warrant, as to which the point involved is the right of a constable or a private person to arrest a person committing a crime. The common law rule is that no valid arrest for a misdemeanor can be made on suspicion; if it is not made on the spot an action will lie for false imprisonment: *Bowditch v. Balchin*; *Griffin v. Coleman*; but if it is made on the spot the arrest may be by any bystander (1).

5 Ex: 378.

4 H. & N. 265.

In *Baynes v. Brewster*, the plaintiff, it appeared, had been making a great disturbance at the defendant's door for the space of two hours. On being told that a policeman was sent for, he ran away. The policeman caught him and apprehended him. It was held that an action for false imprisonment would lie, and that the plea setting out the facts by way of defence amounted to nothing more than a statement that the plaintiff was conducting himself in a violent and illegal manner before he was apprehended, but that he had ceased to do so when the apprehension took place. "No principle," said Williams, J., "is more generally assumed than that a warrant is necessary to entitle a constable to interfere after the affray is over. It is otherwise where the facts shew that the affray is practically going on. This is on account of the obvious distinction as to public danger between a riot still raging and one no longer existing."

2 Q. B. 375.

Must be
during the
affray.

There is no difference in this respect between one kind of

Misde-
meanor.

(1) The Metropolitan Police Act (2 & 3 Vict. c. 47, s. 64) authorises any constable belonging to the Metropolitan Police, to take into custody, without a warrant, all persons whom he shall have good cause to suspect of having committed, or being about to commit any felony, misdemeanor, or breach of the peace.

- 3 B. & Ad : 798. *Fox v. Gaunt.* With regard to felonies, however, the rule is somewhat different. A constable may arrest a supposed offender for felony without a warrant, upon a reasonable charge made by a third party, and this although, upon investigating the charge, it turn out that no felony has been committed. But there must in all cases exist a reasonable charge and suspicion: *Hogg v. Ward*; or, as it was put by Bramwell, B.: "It is not every idle and unreasonable charge which will justify an arrest, but there must be a charge not unreasonable." If a person comes to a constable and says of another *simpliciter*, "I charge this man with felony," that is a reasonable ground, and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but he is responsible for so doing.
- Arrest by private person. 8 C. & P. 522. With regard to an arrest by a private person on suspicion for felony, it is necessary in addition that a felony should actually have been committed: *Allen v. Wright*.

Reasonable and probable cause.

We have here, for the second time, the question of reasonable and probable cause. In the way it has been stated, it is clear that the burden of proving it is on the defendant. It will be remembered that in the case of malicious prosecution the burden of proving its absence is on the plaintiff. Beyond this, however, there is nothing in common between the two actions, although they are very frequently combined in one. They are, however, not unfrequently compared, more especially when it is endeavoured to find a reason why in one case the burden of proving reasonable cause is on the plaintiff, and in the other on the defendant. If it is necessary to allege a reason, it may be found in the different natures of the two actions. In false imprisonment the plaintiff's liberty has been restricted, and his rights have been violated, and a tort has, therefore, been committed unless it can be justified by shewing that the defendant at least acted as a reasonable

The burden of proof is on the defendant.

man in considering that he had cause for imprisoning the plaintiff. In malicious prosecution, however, there has been a prosecution and an acquittal, and the law considers its own acquittal sufficient vindication for the plaintiff: it will, however, punish, by the infliction of damages, the defendant for maliciously setting the law in motion against an innocent person, but the existence of the malice, both in law and in fact, being the gist of the plaintiff's case, must be proved by him.

In both cases, however, the existence of reasonable and probable cause is a question of law for the judge, upon the facts as found by the jury: *Lister v. Perryman*.

L. R. 4 H. L.
521.

CHAPTER XI.

Of Injuries to Reputation.

STRICTLY speaking, false imprisonment is, as it is always treated, a violation of a person's right to the liberty of his person. It is evident, however, that when the confinement is an actual and not a legal imprisonment, there is also coupled with an injury to the person an injury to his reputation. Malicious prosecution, on the other hand, falls entirely on the other side of the line, the damages recovered being entirely in respect of injuries to reputation. This question we have already considered under the head of *Malice*. The remaining tort which is injurious to reputation is defamation of character, or, in the older language of the law, actionable words, which are subdivided into slander and libel, according as they are written or unwritten.

The subjects of slander and libel have been so frequently and so compendiously treated, that we need only consider the more important features.

DEFAMATION.

General statement as to words actionable and non-actionable.

An action may be brought against the speaker of any words which have been productive of damage to the person spoken of.

Words, however, are usually said to be "*actionable*" or "*non-actionable*," according as the damage has to be proved or not. In "*actionable*" words the law presumes damage; in "*non-actionable*" words the law does not presume it, but requires proof of the damage alleged to have happened.

It is usual to adopt the exhaustive classification of the cases in which the law presumes damage given by Mr. Starkie in his *Law of Slander*: it is as follows:—

- (i.) Where an indictable offence is imputed.
 - (ii.) Where a contagious or infectious disorder is imputed.
 - (iii.) Where an injurious imputation is made of a person in his office, profession, or business.
 - (iv.) Where the words tend to the disherison of the plaintiff.
- These four classes constitute slander proper.
- (v.) Where the defamation is propagated by printing, writing, pictures, or effigy.

The cases in which the law presumes damage.

This fifth class constitutes libel.

We propose to notice shortly the rules in each of these cases to be collected from a few important cases.

§ 1. SLANDER.

(i.) *Where an indictable offence is imputed.*

In *Holt v. Scholefield* the words were: "Tim Holt (meaning the plaintiff) has forsworn himself (meaning that the plaintiff had committed wilful and corrupt perjury), and I (meaning the defendant) have three evidences that will prove it." A rule which had been laid down in a previous case that "words which tend to the infamy, discredit, or disgrace of the party are actionable," was held to be too wide, and the Court adopted the following as the true rule: "The words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanour." It was further held, that if the words are not actionable in themselves, their meaning cannot be extended by an innuendo: and that "forsworn" could not of necessity be held to mean that the plaintiff had committed perjury.

6 T. R. 691.
Imputation of offence.

Must be scandalous.

In the cases, says Mr. Starkie, "it is observable that stress has been laid upon the terms *scandalous* and *infamous*, used

as descriptive either of the crime charged or the punishment appertaining to it." And the above rule was also laid down in *Ogden v. Turner*. The words were, "There goes A., who is one of those that stole B.'s deer." Although the punishment for the offence imputed was fine or imprisonment, yet it was held the words were not actionable: for if one be found guilty of any common trespass, he shall be fined and imprisoned, yet none will say, that to say one has committed a trespass will bear an action." The Court held that to be actionable, "the thing charged upon him must in itself be scandalous."

6 Mod: 104.

Imprisonment
as a punish-
ment not
necessarily
scandalous.

(ii.) *Where a contagious disorder is imputed.*

Certain viru-
lent disorders.

2 T. R. 473.

Must be at
time present.

With regard to contagious or infectious disorders, it is perhaps more accurate to say that this form of slander relates only to venereal complaints of the more virulent type. And it was further laid down in *Carslake v. Mapledoram* that the words to be actionable must not refer to a time past, but to a present continuance of the disorder. The distinction between crimes and infectious diseases was thus pointed out by Ashurst, J.: "Charging a person with having committed a crime is actionable, because the person charged may still be punished: it affects him in his liberty. But charging another with having had a contagious disorder is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society."

(iii.) *Where an imputation is made on a person in his business.*

Unfitness for
business or
profession.

1 C. & J. 301.

With regard to words tending to shew an unfitness of a person for the office he holds, the rule was thus laid down in *Lumby v. Allday*: "Words are actionable when spoken of one in an office of profit which *have a natural tendency to occasion the loss of his office, or when spoken of persons*

touching their respective professions, trades, and businesses, and do or *have a natural tendency to tend to their damage.*" The rule, as usually understood before this case, had the words "will probably" in lieu of those italicised: but Bayley, B., insisted that these words were too loose, and therefore introduced "natural tendency;" which confines the effect of the actionable words to shewing the want of some necessary qualification, as honesty, capacity, or fidelity, or to some misconduct in the office. Therefore, in the case of a clerk to a gas-light company who had been charged with immoral conduct with women, it was held not actionable, "because the imputation the charge contains does not imply a want of any of those qualifications which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk." The injury being to the reputation, it is immaterial whether the office is paid or honorary: the main ground, in either case, being the probability of loss of the office, and consequent dishonour in the eyes of the world, which might follow if the plaintiff had really been guilty of the crime charged. The rule applies to all professions, however exalted, and to all trades, however humble, so long as the words clearly refer to the profession or trade.

Must have a natural tendency to occasion loss.

Charge of immorality insufficient.

[Subject, however, to the rule as to temporal damage, *ante*, p. 144.]

There are a few cases in which the reference to the profession or trade is not express, but is so obvious that it will be inferred by law: for example, to say of a servant that "he is a lazy, idle, and impertinent fellow," or of a barrister that "he is no lawyer," would in both cases be actionable. It is hard, however, to draw the line. An obvious case on the other or non-actionable side may be suggested, as to say of a surgeon "he is no dentist." The case of *Doyley v. Roberts* is much more difficult to understand. The plaintiff was an attorney, and the words, "He has defrauded his creditors, and has been horsewhipped off a race-course," were held not to come within this rule, and not to be actionable, although they would seem clearly to affect an attorney's professional reputation.

Reference to trade may be inferred.

3 Bing: N. C. 835.

(iv.) *Where the words tend to disherison.*

Cro. Car:
469.
Tending to
disherison
sufficient:
plaintiff need
not be dis-
inherited.

Finally, as to words tending to the disherison of a person; in *Humphreys v. Stanfield* the words "Thou art a bastard" were held actionable: "for, by reason of these words, the plaintiff may be in disgrace with his father and uncle, and they, conceiving a jealousy of him touching the same, may disinherit him; and though they do not, yet the action lies for the damages which may ensue."

Damage in
slander.

This last sentence introduces us to the important question of damages, and their relation to the action for slander.

As we have already explained, these four are the only cases of slander proper which are said to be "actionable"; that is, unless the words spoken fall within one of these classes no action can be brought without proof of the damage suffered. In these four cases the law presumes damage.

Law endea-
vours to
appreciate
human nature.

We have already, in the chapter on Damages, pointed out what this presumption of damage really means. Many of the examples there discussed were cases of slander: this subject indeed must afford the best illustrations of the principle, not only because it furnishes us with cases both within and outside the principle, but also because the lines separating the two sets of cases are drawn with such remarkable precision.

[*ante*, p. 306.]

The law endeavours to appreciate the subtle influences which operate on the human mind, and declares that in these four cases of slander the words cannot be spoken without influencing, in however minute a manner, other people to the detriment of the person acted against: as was said in *Lumby v. Allday*, the words have a *natural tendency* to do damage. It is this natural tendency which the law endeavours to follow. But on the other hand, as to words spoken, which fall outside these four cases, the law refuses to presume that people's conduct should in the least degree be influenced by them to the disadvantage of the person to whom they refer.

But if their conduct has been so influenced, on proof of the

damage suffered, the plaintiff is entitled to compensation in damages.

Whether the law has been successful in this endeavour to understand human nature, whether one or more classes of "actionable" words could not now with complete justice be added to the old list, is another matter. There is one class especially, where incontinence is imputed, against which the minds of the judges have always revolted. It clearly falls outside the line of presumption of damage, and consequently has always been held not actionable without proof of damage.

Imputations
of unchastity.

[cf: Lord Campbell's judgment
in *Lynch v. Knight*.]

The real hardship however seems to lie, not in the rule which refuses to presume damage in such cases, but in the rigorous manner in which the rules as to remoteness and "temporal" damage have been applied.

Application of
rule as to tempo-
ral damage:
[cf: p. 144.]

Where, in consequence of an imputation of unchastity, a woman who is about to be married loses her marriage, the requirement that damage should be suffered is satisfied, and an action will lie: *Davis v. Gardiner*. But where the damage was the woman's illness and its consequences, incapacity to attend to business and expense of cure, it was held that it would not support the action. "Probably," said Bramwell, B., "because the law holds that bodily illness is not the natural nor the ordinary consequence of the speaking the slanderous words." The illness is therefore too remote, and that being cut off, its attendant consequences must also be cut off: *Alsop v. Alsop*. If the words had been, "She had a child, and if she have not a child she has made it away," the case would fall within class (iii.), because it imports a felony, and an action would lie without proof of damage: see *Barnes v. Brudell*. Again in *Lynch v. Knight*, in consequence of a charge of levity (but not incontinence), the husband turned his wife out of doors. It was held that no action lay, on the ground that the damage was not the natural result of the slander, but arose from the precipitancy or idiosyncrasy of the husband. "The act constituting the special damage must be such as might be expected from a reasonable man

4 Co: 16 d.

Application of
rule as to
remoteness.

5 H. & N. 534.

1 Lev: 261.

9 H. L. ca:
577.

Result must
not be owing
to husband's
idiosyncrasy.

who believed the truth of the words according to the intention of the slanderer."

[*ante*, pp. 144,
145.]

The rule as to temporal damage we have already considered as exemplified by the cases of *Roberts v. Roberts* and *Chamberlain v. Boyd*.

L. R. 7 Q. B.
112.

Davies v. Solomon is to be distinguished from those cases. An imputation of unchastity on a wife "whereby she was injured in her character and reputation, and lost and was deprived of the companionship, and ceased to receive the hospitality of divers friends, and especially of A, B, and C," was held to disclose a good cause of action, because hospitality means meat and drink given gratuitously, and this is temporal damage.

Rule as to
proof of
technical spe-
cial damage.

[*ante*, p. 152.]

Another difficulty arises from the impossibility of determining accurately whether mere proof of damage is sufficient to support the action, or whether technical special damages must be shewn. We have already dealt with this point also, and it will therefore be sufficient to notice one or two additional cases of slander.

In the above-mentioned case, *Davies v. Solomon*, although the names of some of the friends were given, it does not appear that there was any further attempt to prove technical special damage.

1 Sid: 396.

But in an old case, *Barnes v. Prudlin*, words spoken against a woman's chastity "*per quod il perd suiters*" was held insufficient, unless the particular suitors were specified.

29 L. J: Ex:
125.

On the other hand, in *Dixon v. Smith* an action was brought by a surgeon and accoucheur for slander, imputing to him, in words spoken to one D., that a female servant of his had had a child by him. Special damage, that D. had by reason thereof refused to employ the plaintiff in the way of his profession on a certain occasion, whereby he lost the fee in respect of such attendance, and had been greatly injured in the way of his profession and the number of patients employing him in it. The case did not fall within either of the four classes given above, and Martin, B., held that the

damages were not to be confined to the guinea fee which he had laid specially, but that the jury might consider how much general damage he had probably sustained "through the special damage laid." But the decline of business could only have arisen in consequence of repetitions of the slander for which, as we shall see, the original utterer is not liable." [Post, p. 312.]

The true rule is probably the one given by Gould, J., in *Iveson v. Moore*, in which the degree of particularity required is said to depend on the number of people whose conduct has been affected by the slander, and the consequent convenience or inconvenience of proof. [See the judgment given on page 151.]

Words, the subject of an action for slander, are not to be understood, as was once supposed, *mitiori sensu*; they are to be fairly and naturally construed in the plain and popular sense in which an ordinary hearer would naturally understand them. As where the defendant said that the plaintiff "was under a charge of a prosecution for perjury; and that G. W. (an attorney of that name) had the Attorney-General's direction to prosecute the plaintiff for perjury." Lord Ellenborough, C.J., held that there were three constructions of which the words were capable: that he was ordered by the Attorney-General to be prosecuted, either for a perjury which he had committed, or which he had not committed, or which he was supposed only to have committed: that the first was the natural construction, and that the words fell within the first of the classes given above, and were, therefore, actionable without proof of damage: *Roberts v. Camden*. Words to be construed as an ordinary person would understand them.

So in *Hankinson v. Bilby* an indictable offence was imputed in the presence of bystanders: the speaker apparently did not mean actually to impute the commission of the offence: Parke, B., held that if the bystanders had been proved to have understood the words in the same sense as the speaker, then he would have been entitled to a verdict: but in the absence of such proof, "words uttered must be construed in

9 East 93.

16 M. & W.
442.

the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject." See also the rule laid down in *Lynch v. Knight*.

[*ante*, p. 309.]

Statements affecting property.

1 Ex: D. 91.

[*cf.* p. 152.]

[*post*, p. 376.]

Liability for repetition.

7 Bing: 211.

1 H. & C. 153.

16 L. T. 263.

31 L. J: Ex: 331.

The rules of slander would seem to extend to words which affect not the person's reputation but his property: such, for instance, as a statement that a tradesman was suffering from scarlet fever, which would naturally operate to prevent people going to his shop; or, as in *Riding v. Smith*, where the statement was that the plaintiff's wife had committed adultery, which the Court held would also naturally prevent people from frequenting the shop. The case was apparently decided on the assumption that it was necessary to prove technical special damage in cases of slander other than the four special classes, but that it was only necessary to prove general damages in this case. The decision therefore does not throw much light on the question: possibly it should fall within the rule laid down in *Malachy v. Sloper*, as to slander of title.

With regard to the damages, an important question as to remoteness arises when the damage has arisen from the repetition of a slander. The rule was laid down in *Ward v. Weekes* that damages could not be recovered in respect of the repetition. "Where the words are not actionable *per se* the original utterer of the slander is not liable, unless either the person who was influenced by them was present and heard them spoken, or the utterer authorised their repetition." (Pollock, C.B., *Parkins v. Scott*.)

The only exception is where there is a duty or moral obligation on the party to whom the words are spoken to repeat them: as where words are spoken to a husband such as, if true, would render the subject of them unfit to associate with his family: *Derry v. Handley*. But this rule has been doubted, and the original utterer held not liable for such repetition; see *Parkins v. Scott*.

Passing from slander proper, we come to the fifth class of words actionable *per se* or without proof of damage, that is to say,

§ 2. LIBEL.

The rule is laid down in the short head-note to *Thorley v. Lord Kerry*: "An action may be maintained for words written, for which an action could not be maintained if they were merely spoken." It is to be noticed that in his judgment Lord Mansfield, C.J., protested strongly against the difference between slander and libel, but held that he was governed by authority. Into the reasons for the distinction we do not propose to enter at any length: it is sufficient to notice that the two more generally advanced are, (i.) that the tendency of libel to cause a breach of the peace is more direct than that of slander: this is obviously untrue; (ii.) that written defamation has a more extended circulation than spoken words.

4 Taunt: 355.
Law presumes
damage from
written
slander, or
libel.

[A third reason has also been advanced by a learned American writer based on historical considerations, which, says Mr. Bigelow, is not only ingenious but bears evidence of probability.]

[Leading Cases,
p. 99.]

The second, although occasionally untrue, seems however to be the true reason, and to accord with what we have already said on the subject of presumption of damage. As in the four classes of slander, where the law, in its appreciation of human nature, refuses to believe that no damage can arise from the uttering of the words; so where the words are written, whether they fall within one of these four classes or not, if they are directed against a person's reputation, the law refuses to believe that in some way or other the person of whom they are spoken will not be harmed at least in some slight degree. One other reason for this belief suggests itself: with slander the words may not dwell in the memory, but with libel there is a permanent record serving to keep the charge fresh in the imagination of the person or persons spoken to, and this quite irrespective of the repetition of the

libel by shewing the writing to people other than those to whom it is addressed.

The first question which naturally arises is what is a libel ? It may be useful to remember that the definition of libel will also include the definition of slander not actionable *per se*.

Definition of libel.

6 M. & W.
105.

Two definitions will be sufficient. "A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule." (Parke, B., *Parmiter v. Coupland*.) Thus a charge pointing to anything like inability in respect of pecuniary resources would, to persons reading such a statement in a public newspaper, tend to injure his position in the world : so it is libellous to charge a man with ingratitude generally, without any reason being given.

3 Johns' Cases
[U.S.] 354.

"A censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates or individuals": *The People v. Cosswell*.

[*ante*, pp: 260,
309.]

These definitions do not apply to words not actionable *per se*; as we have already seen, untrue words, whatever imputation they may contain, if they produce damage are actionable.

Functions of judge and jury.

7 App: Ca:
741.
[*per* Lord Selborne, C.]

Secondly, it is important to inquire upon whom the duty lies of determining whether the writing in any given case is or is not a libel. The respective functions of judge and jury in an action for libel have recently been elaborately explained in the case of *The Capital and Counties Bank v. Henty* in the House of Lords. "It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it." (Wilde, C.J., *Blagg v. Sturt*.) [This was put in a slightly different way by Parke, B., in *Parmiter v. Coupland*. The judge is first to give a legal definition of libel, and then to leave it to the jury to say whether the facts necessary to constitute a libel are proved to their satisfaction.]

10 Q. B. 899.

But if the judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury.

Thirdly, in deciding the question whether the words are capable of the meaning alleged in the innuendo, the same rule of construction must be adopted as in the case of slander: "The judge ought not to take into account any mere conjectures which a person reading the document might possibly form, as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest, as implied in the publication, those particular motives or reasons."

Reasonable construction to be adopted.

[~~per~~ Lord Selborne, C.]

JUSTIFICATION.

We have now to inquire what amounts both in slander and libel to a justification of the defendant's words.

(i.) *Truth.*

The defendant, says Mr. Starkie, is *primâ facie* justified in law, and exempt from all civil responsibility, if that which he publishes be true. For no one, in point of natural justice and equity, can have any title to a false character; he can shew no legal interest in the suppression of truth, or in the continuance of error; it would be inconsistent with every sound legal principle and analogy, to allow him to recover damages for an injury to that which he either does not, or at least ought not to possess; and it would be contrary to the plainest and most obvious principles of public policy and convenience, to permit a man to make gain of the loss of that reputation and character in society, which he had justly forfeited by his misconduct. And since, if the words are true,

Truth a justification.

no offence is committed, it follows from what has already been said that it is immaterial that the statement has been made with the greatest possible malice in fact and desire to injure the plaintiff.

Must be fully
proved.

But on the other hand if the truth be pleaded, the strongest proof of it will be required. Thus if an indictable offence is charged it will be necessary to support the justification with precisely the same evidence which would be required on the trial of the indictment: *Cook v. Field*.

3 Esp: 133.

(ii.) *Privilege.*

Justification
of privilege.
Judicial
privilege.

Privilege is of several kinds.

(a) There is a privilege accorded to all who take part in judicial proceedings in respect of statements made by them reflecting on the parties, witnesses and others, which would otherwise amount to slander.

37 L. J: Ex:
155.

In *Scott v. Stansfeld* the broad proposition was laid down that an action is not maintainable against a judge for words spoken by him in his judicial character and in the exercise of his judicial functions in the Court within and over which he presides (which words, as against an ordinary individual, might be actionable), although spoken maliciously, without probable cause, and corruptly and irrelevantly to the matter at issue. The reason given for the rule is that it is not for the protection of a malicious, corrupt, or offending judge, there being a proper remedy in such a case, but for the benefit of the public who are entitled to require that the judges should be independent, and should be protected by the law in exercising their functions without fear.

Judges.

Advocates.

10 Q.B.D.
588.

And this privilege extends to advocates (counsel or solicitors): the most recent case on the subject being *Munster v. Lamb*. The law was there laid down by Brett, M.R., in the strongest way possible: "For the purposes of my judgment I shall assume that the words complained of were uttered by the advocate maliciously, that is to say, not with the object of

doing something useful towards the defence of his client. I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the Court in which they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been. . . . For more than a judge, infinitely more than a witness, he (the advocate) wants protection on the ground of benefit to the public.”

Witnesses.

The same rule applies to witnesses in a cause: *Revis v. Smith; Henderson v. Broomhead*. 18 C. B. 126.
4 H. & N. 569

(β) There is a privilege in respect of all Parliamentary proceedings and petitions; in respect of reports to military officers; in respect of reports of trials and other judicial proceedings; in respect of reports of Parliamentary proceedings; in respect of reports of public meetings (by the Newspaper Libel and Registration Act, 1881); in respect of reports and comments upon matters of public interest; in respect of literary and other criticism; in respect of communications made to the proper public authorities; and in respect of publications in vindication of character.

Parliamentary and other privileges.

All these are fully commented on in Ball's Leading Cases [pp: 73 *et seq.*].

(γ) There is also a privilege in respect of communications made between persons standing in certain special relationships one to the other.

Privilege arising out of special relations.

Before, however, considering this privilege it will be advisable to consider at once the place which actual malice holds in the law of Slander and Libel.

Privilege is not unusually said to be of two sorts, absolute

Absolute and

qualified privilege.

and qualified, according as malice may or may not be held to countervail the privilege. It will be gathered from what we have said on the subject of the privilege which is extended to all who take part in legal proceedings, that no action will lie for words uttered during the course of them under any circumstances whatever, not even if they are uttered with the most malicious intent. This privilege is therefore said to be absolute. The same rule applies to the first two privileges in the second group. But with regard to all the others in that group and the third class, now to be considered, the privilege, if it is set up, may be rebutted by proof of actual malice, that is, malice in fact.

"Malice in fact" rebuts the privilege.

It is necessary shortly to revert to what we have already said on the subject of malice. All wrongful acts done intentionally and without just cause or excuse are in the eye of the law done maliciously. Consequently all slanders and libels are malicious in law unless they are spoken or written on a privileged occasion which is a just cause or excuse for the act. But the law recognises the human passion called malice, giving it the name of "malice in fact"; and the manner in which it does so in the law of slander is this, it declares that if the occasion on which the privilege would otherwise arise is made use of for any purpose other than an honest one, or for any purpose other than the occasion itself requires, although the occasion be privileged yet the privilege shall be immediately taken away.

Privilege and Truth, it will thus be seen, cannot both be justifications in the same matter. Truth is an absolute answer, Privilege is only required to protect those who under certain circumstances make false, or rather erroneous, statements.

Necessity for the privilege.

We may now proceed to deal with the third class of privilege: and it will be seen from the occasions on which it arises that if there were no such privilege, if the words spoken on these occasions could be made the subject of an action for

damages, it would be impossible for the affairs of mankind to be conducted. On the other hand, the rule as to malice is intended as a wholesome check on the too unrestrained use of this otherwise essential protection. It remains therefore to be seen on what occasions this privilege arises.

The leading case on the subject is *Bromage v. Prosser*. The facts were as follows: One Watkins met Prosser and said, "I hear that you say the bank of B. & S. at Monmouth has stopped. Is it true?" Prosser said, "Yes, it is; I was told so." He added, "It was so reported at Crickhowell, that nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Prosser repeated "I was told so." He had in fact been told at Crickhowell that there was a run on the bank, but not that it had stopped, nor that nobody would take their bills; what he said therefore went far beyond what he had heard. In his judgment, Bayley, J., first discussed the distinction between malice in law and malice in fact; he then declared the questions for the jury to be, first, did Prosser understand Watkins as asking for information with reference to the solvency of the bank? This was necessary, because "Is it true?" might have meant, "Is it true you said what you did?" or "Is what you said true?" If they answered this in the affirmative, the case would "range under the cases of privileged communications," and consequently the second question for the jury would be as to the existence of malice in fact, in order to see whether the privilege would be rebutted.

[cf. his judgment. ante, p. 272.]

Under the head of false representation we hinted that one form of it must arise in those cases in which the party damaged was the party spoken about. Where information is requested as to the solvency of a person and the answer given is that he is not to be trusted, if this is untrue, it is possible of course that the person making the inquiry may be the person damaged; but as a general rule an injury will result to the

Connection between slander and false representation.

person spoken of. Whether this injury be called false representation (as it clearly may be) or slander, with regard to the important question of damages, is immaterial. For as a slander it falls under the third class of actionable words, namely, injurious imputations made of a person in his business, and as such may be sued upon without proof of damage. An important consideration however does arise when we have to inquire whether the rules as to truth, privilege, and malice, in the law of slander correspond with those as to knowledge of falsity in the law of fraud.

The tests of malice and fraud are practically the same.

One other element is common to both torts, unless the statement be false in fact no action will lie in either case.

The inquiry which we have suggested is therefore limited to this: First, when the words are spoken in answer to a question (the privileged occasion of the law of slander), is the rule as to false representation to be applied as the test of that malice which is sufficient to rebut the privilege? Secondly, do the same principles govern voluntary communications?

[*cf.* Fraud, p. 254.]

The rule as to knowledge of falsity at which we have arrived is, that the defendant is liable for a false representation if he affirms that to be true within his own knowledge which he does not know to be true, or if he affirms that to be true which he does not believe to be true.

[*ante*, p. 283.]

The definition of "malice in fact" is something "actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody."

3 Q. B. 5.

In *Fountain v. Boodle* it was laid down expressly that of the various proofs of malice which may be laid before the jury one may be "that the statement is false to the knowledge of the party making it": the judgment seems also to warrant the statement in the head-note, "or, as to matters of opinion, that the defendant (in making the statement) did not really act on the opinion which he professes to have entertained." Patteson, J., said during the argument, "Falsehood in fact is

no proof of malice, unless the proof involves knowledge of the truth." "The defendant must shew that the assertion was made with an honest belief of its being the truth." So far this exactly tallies with the rule as to absence of belief in the case of fraud: there seems however to be no case at present decided as to whether the first part of the above rule, which refers to reckless statements, may safely be called malice. It is suggested that it is. And there are dicta to support the contention. In *Davies v. Snead*, for example, L. R. 5 Q. B. at p. 611. Blackburn, J., said that an action would lie for words spoken "wantonly," that is, without such occasion as would render it right for a person to speak them; and in *Clark v. Molyneux*, 3 Q. B. D. at p. 247. Brett, J., said: "So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive." In effect the inquiry in both cases is as to the *bona fides* of the statement; the two rules might well be stated thus: if it is not *bonâ fide* it is fraudulent; if it is not *bonâ fide* it is also malicious. It will be found too that if there is any distinction in any part of the law of torts between the rules as they affect injuries to the person, and injuries to property, the former are invariably the more severe. The ordinary form of false representation is an injury to property; in its other form it is an injury to the person or reputation, and it is then called slander or libel. It seems clear then that whatever the rules may be in the latter case they include all the rules laid down in the former. Malice in fact therefore may be accurately said to include fraud.

Reckless
statements.

L. R. 5 Q. B.
at p. 611.

3 Q. B. D. at
p. 247.

[e.g., injuries by
animals, *fera
nature*. cf:
p. 107.]

It is said that there are other means of proving malice, for example, from the mode of publication, irrespective of belief in its truth. This rule is given in Starkie [p. 457]: "When-

Malice proved
from method
of publication.

L. R. 9 C. P.
393.

ever a means more injurious than necessary is resorted to for the publication of defamatory matter, it affords evidence of malice, though the communication be in other respects privileged"; as in *Williamson v. Freer*, where a telegram was sent to the plaintiff's father to the following effect: "Your child will be given in charge of the police unless you reply and come to-day. She has taken money out of the till." The statement to the father would have been privileged. Brett, J., said, "I think that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office, because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post-card." The point of the decision seems however to be not that there was malice in the fact of communicating by telegram, but that there was a publication to persons in respect to whom the privilege did not arise.

The occasions which create the privilege.

(i.) Communications relating to business between strangers.

[*ante*, p. 319.]

Business com-
munications.

2 C. B. at p.
601.

[*Leading Cases*,
p. 174.]

5 H. & N. 838.

Bromage v. Prosser affords the best illustration of this class, which includes the giving of confidential advice, and communications made to persons who ask or who have a right to expect them. Such advice or communication is privileged. "The duty which may be supposed to exist, to give advice faithfully to those who are in want of it, has been allowed to prevail for the sake of the general convenience of business, though with some disregard of the equally important rule of morality, that a man should not speak ill, falsely, of his neighbour." (Coltman, J., *Coxhead v. Richards*.) And it would seem that the privilege extends to all subsequent communications made on the subject-matter of the original inquiry. Mr. Bigelow gives the following rule, which is warranted by *Beatson v. Skene*: "When a confidential communication is made between two persons with regard to an inquiry

of a private nature, whatever takes place between them, relevant to the same subject, though at a time and place different from those at which the confidential relations began, may be entitled to protection, as well as what passed at the original interview; and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relations already established between them, so as to be entitled to the same protection.”

Privilege may continue for some time.

The question then arises, does a similar privilege extend to voluntary statements? It will be remembered that much stress was laid, in *Bromage v. Prosser*, on the question whether the defendant thought an inquiry had been addressed to him.

Voluntary statements.

[*ante*, p. 319.]

In *Coxhead v. Richards* the facts were as follows: C., the mate of a ship, sent to B., a stranger, a letter charging A., the captain, with gross misconduct. B. shewed the letter to D., the owner, who dismissed A. The Court was equally divided in opinion; Tindal, C.J., and Erle, J., holding the communication by B. to D. privileged, Coltman and Cresswell, JJ., that it was not privileged. The judges agreed however on two important propositions:

2 C. B. 569.

(a.) If a person has any personal interest in the subject-matter to which the communication relates (*e.g.*, if he had been a part owner of the ship, or underwriter on the ship, or had had any property on board), the communication is privileged. As in *Blackham v. Pugh*, where the defendant, being a creditor of the plaintiff, was held to have a direct interest in preventing certain money in the hands of an auctioneer from being paid over to the plaintiff, sufficient to make an honest communication to the auctioneer that the plaintiff had committed an act of bankruptcy, come within the rule of privilege.

Personal interest in subject-matter.

2 C. B. 611.

(b.) If the communication discloses danger to the subject-matter to which it relates (*e.g.*, to the ship or cargo, or the ship's company), and the danger is apparently so imminent that the disclosure is necessary to avert the danger, “then,

Imminent danger to subject-matter.

upon the ground of social duty, by which every man is bound to his neighbour, the defendant is not only justified in making the disclosure, but is bound to make it.

Test of the
prudent man.

The question to be determined in the case was however whether a person having information affecting (but not so as to produce imminent danger) the interests of another, may not make a privileged communication of it, although he has himself no personal interest in the matter: and on this point the judges differed. The difficulty is limited, as we shall see, to people who stand in no other relation of confidence to one another, that is, to people who are technically called strangers to one another. It must be confessed however that the test suggested by Tindal, C.J., seems to accord with many other decisions on kindred subjects. Did the defendant act as a reasonable and prudent man in making the communication? In so many other cases the conduct of the reasonable man is the test of the existence of the duty that there seems no sound reason why it should not be the test in this instance.

5 E. & B. 344.

This seems to accord with *Harrison v. Bush*, where it was ruled that a communication which a person makes *bonâ fide* in discharge of a moral or social duty of imperfect obligation, is privileged. "To which I may add," said Jessel, M.R., in *Waller v. Loch*, "that such is the case where the person giving the information *bonâ fide* thinks that he is discharging a moral or social duty. It is not necessary in all cases that the information should be given in answer to an inquiry."

7 Q. B. D. at
p. 621.

(ii.) Communications between those who stand in a general confidential relation to one another.

Communica-
tions between
family con-
nections.

8 C. & P. 888.

Where the persons between whom the communication passes are connected by family ties, the privilege exists whether the statement is in answer to a question or is made voluntarily, as in *Todd v. Hawkins*, where a letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations on her future husband, was held privileged.

As to this class a broad rule was laid down by Parke, B., in *Cockayne v. Hodgkisson*, "Where the writer (or speaker) is acting on any duty legal or moral, towards the person to whom he writes (or speaks); or where he has, by his situation, to protect the interest of that person, that which he writes under such circumstances is a privileged communication." In the case A., being a tenant of B., was desired by B. to inform him if he saw or heard anything respecting the game. A. wrote to B. telling him that his gamekeeper sold the game: it was held to fall within the above rule. 5 C. & P. 543.
Moral duty.

So in *Clark v. Molyneux*, the Court of Appeal held the following occasion privileged: "where the relation between two persons was so intimate, socially and professionally, as that between a rector and a vicar and his curate, and when it can be said that the vicar is consulting with his curate in ecclesiastical matters." 3 Q. B. D. 237.

Numerous other examples of a confidential relationship might be cited; two more will however be sufficient. If A. is surety for B. to C., A. may lawfully state to C. in an unreserved manner his opinion of B.'s conduct and character, whatever the charges may be which he thus imputes to him: *Dunman v. Bigg*.

1 Camp: 269n.

In *Toogood v. Spyring*, the defendant, a tenant of D., required some work to be done on his premises; the plaintiff being regularly employed by D. was sent by D.'s agent to do it. He did the work negligently and got drunk, as the defendant believed, on cider taken from the cellar. The defendant charged the plaintiff, in the presence of a stranger, with having broken open the cellar door to get at the cider; he repeated the charge to the stranger in the plaintiff's absence, and he also made the same communication to D.'s agent. The Court held the communication to the agent was privileged, but that to the stranger in the plaintiff's absence was not; on the other hand that made to the stranger in the plaintiff's presence was.

1 C. M. & R.
181.

Parke, B., laid down the rule that the privilege existed if

Discharge of
public or
private duty.

the communication was fairly made by a person in the discharge of some public or private duty, whether legal or moral. "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." And in applying this rule to the circumstances of the case, the learned judge held that if the occasion warranted it, a master, or even a person such as the defendant, was justified in charging his servant, or even such a person as the plaintiff, for any supposed misconduct, and to give him admonition and blame; and the fact that he spoke in the presence of a bystander made no difference; unless indeed it were proved that the defendant had sought the bystander's presence in order to speak before him, which might furnish some evidence of malice in fact.

11 Q. B. D.
43.
Case of two
letters put
into wrong
envelopes.

The case of *Tompson v. Dashwood* presents some curious features. D., a director of a company, wrote a letter to the chairman reflecting on T., the managing director, with regard to his conduct in the office: he also wrote on other matters to the secretary, who was T.'s brother; but unfortunately D. put the letters in the wrong envelopes, so that the letter to the chairman went to the secretary. Two things were clear, that the communication, if it had been sent to the chairman, would have been privileged: and that there was no malice in fact either in writing the letter, or in sending it to the wrong person. The Court apparently considered that there was only an inadvertent publication to the plaintiff's brother. But it clearly was not an involuntary act.

[cf. p. 209.]

[ante, p. 325.]

It is possible, however, to consider the case analogous to *Toogood v. Spyring*, where a privileged communication was made in the presence of a bystander. Otherwise it is suggested with submission that the Court overlooked the real point in the case, which was in fact argued, whether the communication to the brother of the plaintiff was not also privileged: if it were, malice was also rebutted in that case: if it were not, malice in fact was immaterial.

(iii.) Characters given of servants are privileged, whether in answer to inquiries or voluntarily, although the parties are usually strangers; the immunity resting, it is said, on the social duty to give the character; and also in many cases on the request by the servant himself.

Privilege in giving characters of servants.

In *Fountain v. Boodle*, in answer to inquiries with regard to a governess, the defendant said, "I parted with her on account of her incompetency, and not being ladylike nor good tempered." The plaintiff gave general evidence of her ladylike manners and good temper, and no evidence was given for the defendant. The words were held privileged. 3 Q. B. 11.

In *Pattison v. Jones*, the defendant, who had discharged the plaintiff from his service, wrote unsolicited a letter to the person who was about to engage him. It was admitted that the letter was privileged. 8 B. & C. 578.

(iv.) Communications made under a sense of public duty. General public duty.

This group of cases is a more extended application of the first class. The communication however is nearly always voluntary. The rule as to them was laid down by Blackburn, J., in *Davies v. Sneed*: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bonâ fide* and without malice does tell them, it is a privileged communication." In applying the rule to the facts of the case, the learned judge said, "I cannot help thinking that when a parishioner hears matters injurious to the clergyman, which would injure his authority and influence as a clergyman, if those facts are *bonâ fide* told under the belief that they are important for him to know, they come within the category of privileged communications." L. R. 5 Q. B. 608.

And on the same principle, in *Waller v. Loch* a communication from the secretary of the Charity Organisation Society, relative to the case of a person from whom subscriptions were being collected, was held privileged. 7 Q. B. D. 619.

The occasion
forms the
privilege.

It is usual to speak of "privileged communications": it would seem however to be more correct to speak of communications made on privileged occasions: the classes of persons we have been considering being those between whom the privileged occasions most frequently arise. The privilege of the occasion was dwelt on by Lord Campbell, C.J., in *Cooke v. Wildes*. And it would seem, although there is no express authority on the point, that the privilege only covers communications made on certain occasions, even in cases where they are made between relatives. The rule would seem to be that the statement must be made with reference to some matter then going forward.

Repetitions of slander or libel.

[*ante*, p. 312.]

We have already seen that the original utterer of the words is not held liable for the damage occasioned by their repetition.

The only other question is whether the person who repeats the words may justify by saying that he had them from another.

5 Bing: 392.
Repetition no
justification.

The rule on this subject was thus laid down in *De Crespigny v. Wellesley*: "In an action for a libel, it is no plea that the defendant had the libellous statement from another, and upon publication, disclosed the author's name;" not even if there is authority from the author for the publication. Best, C.J., put the case as one of joint tortfeasors: "It is a principle of our law that whoever wilfully assists in the doing an unlawful act becomes answerable for all the consequences of such act. What reason is there to except the circulation of slander out of this rule?"

10 B. & C.
263.
L. R. 3 Q. B.
396.

The rule was also adopted in *McPherson v. Daniels*; and in *Watkin v. Hall*, where a rumour current on the Stock Exchange with reference to the alleged insolvency of the plaintiff was repeated by the defendant.

CHAPTER XII.

Of Injuries to Property.

FINALLY, we come to the consideration of injuries to property. The right to property may be defined to be the right to the quiet, peaceable, and comfortable enjoyment of property, or the possession of property uninjured and undisturbed in the mode chosen by the possessor. These injuries may be classified as follows:—1. Interference with the rights to real property, or trespass; 2. Interference with the rights to personal property, trespass or conversion; 3. Interference with incorporeal rights to property, such as contractual rights; 4. Slander of title.

Definition of
right to pro-
perty.

§ 1. TRESPASS TO REALTY.

With regard to trespass, three considerations arise: (i.) what amounts to a trespass: (ii.) what is a justification for the act: (iii.) who may bring the action in respect of it.

(i.) *What amounts to a trespass.*

The right to land being exclusive, every entry thereon, without the owner's leave, or the license or authority of law is a trespass. "If a man's land is not surrounded by any actual fence, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close." The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property. Every interference with the full enjoyment of realty is tech-

[Addison, p.
330.]

3 C. B. 776.

How a trespass may be committed.

nically a trespass to the realty; thus, if a man is unlawfully turned out of his dwelling-house, that is strictly a trespass, whether the defendant had actually entered the premises or not: *Lane v. Dixon*.

The illegal act may interfere with the right to property in several ways: there may be, by walking, actual damage to the soil, grass or shrubs: there may be a withholding of the rays of the sun, of the currents of air, of requisite shade, or of the falling dew: the air may be rendered impure and noxious; there may be an interference with the privacy of a dwelling-house; or the act may be a use of the property for which the owner or occupier might otherwise have exacted payment; or it may be one which, by being repeated, may become the first of a series which would, by prescription, eventually create a right adverse to the possessor.

[*Addison*, p. 331.]

Thus, the following acts have been held to be trespasses: If one man throws stones, rubbish or material of any kind on another's land: or if one pour water out of a pail into another's yard, or fix a spout so as to discharge water upon another's land, or suffer filth to ooze through a boundary wall and to run over another's close or yard. So the rule of law being correctly stated by the maxim *cujus est solum, ejus est usque ad cælum*, the erection of a building overhanging another man's land is a trespass, and it is immaterial how small the building be, or whether it be only a signboard.

Nuisances.

Nuisances which affect the rights to property are, as we have already pointed out, trespasses pure and simple; when they are injurious to health they affect the rights to the person. But as injuries to property they take many forms, all of which are, however, governed by the principles of the law of trespass. An overhanging building, when it causes the rain which accumulates upon it to drop on to the adjoining land, is commonly called a nuisance, though this is clearly only one of the ways in which it may injure or disturb the rights of the adjoining occupier. A stinking tallow furnace, or smelting house, or chemical works, give off fumes which, if they are not

Forms of trespass.

consumed upon the premises and travel beyond the border of the premises on which they are created, interfere with the purity of the air which is the neighbouring landowner's privilege to possess. If the sound coming from noisy workshops be not restrained, the sound waves travel over the neighbour's property, disturbing the peaceful enjoyment of it to which he is entitled: or, in the same way, a decoy pond may be disturbed by the firing of guns. So if a reservoir has been constructed on a man's land, and it bursts and overflows on to his neighbour's: and similarly with certain animals, if they break loose from their master's yard, trespasses on the neighbour's land are committed. It is unnecessary further to accumulate instances of the varied nature of nuisances: sufficient have been given to present some notion of the forms of injuries to property which trespasses take. We may proceed therefore at once to consider

(ii.) *What amounts to a justification for the trespass.*

(a.) *Necessity.*

The plea of necessity is sometimes a good justification for entering on another man's land. The common illustration usually given is where a man is assaulted and being in danger of his life escapes on to the property of another; the justification being based on the necessity for the preservation of his life.

Trespass by necessity is justified.

It is also said generally that if a way be impassable, a man is excused for going on to the adjoining land so long as he does the least possible damage. None of the cases usually cited, however, bear out such a wide proposition, the judgment in *Absor v. French*, generally given as the authority, going beyond the facts of the case. The plea was that the plaintiff had stopped the road so as the defendant could not pass. The Court held the plea good, "for if the way be so foul as is not passable I may then justify going over another man's

Impassable ways.

Show: 366.

W. Jones,
296.

2 Dougl: 745.

3 T. R. 253.

1 Raym: 725.

[Bigelow, p. 380.]
Trespass to
rescue owner's
property not
always justi-
fied.

Justification
by legal autho-
rity.
Blackstone
III. p. 414
(8th ed:)

close next adjoining." In *Henn's Case* the right was rested solely on the failure on the part of the neighbouring occupier to perform his duty by mending the road. This would certainly seem to be the origin of the justification. In *Taylor v. Whitehead*, where there was only a right of way over the plaintiff's field, the fact that it was impassable was held not to justify a trespass on the adjoining land, because the right must be strictly limited to the way itself.

This justification seems also to have rested originally on the necessity for preservation of life: it was so pleaded in *Henn's Case*. And similarly where tow-paths exist by custom (*Ball v. Herbert*), if the river has rendered them foundrous and impassable the towers may go on the nearest part of the field next adjoining: *Young v. ———*.

So if J. S. go into the close of J. N. to succour the beast of J. N., the life of which is in danger, an action will not lie; because as the loss of J. N. if the beast died would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent his corn from being consumed by hogs, or from being spoiled, trespass lies; for the loss, if either of these things had happened, would not have been irremediable. And if a stranger chase the beast of A., which is *damage feasant*, out of the close of B., trespass will lie; for by doing this, although it seem to be for his benefit, B. is deprived of his right to distrain the beast.

So where the entry is by authority or license of law it is justified, this being very nearly akin to the justification of necessity—"as where it is done in the exercise of a right of way, a right of common or the like: or where a man enters to demand or pay money there payable, or to execute, in legal manner, the process of the law. So a landlord may justify entering to distrain for rent; and a reversioner to see if any waste be committed on the estate, for the apparent necessity of the thing."

(β.) *Where one person's property is on another person's land.*

If goods have come on another's land by inevitable accident, that is, where the original trespass is involuntary, the subsequent trespass to fetch them is justified: as where fruit is blown off my tree on to my neighbour's land, I am justified in going to pick it up; or where the tree itself has been blown over, or through decay falls into a neighbour's ground, I am justified in going on his land to remove it: *Millen v. Fawdry*. But if the loppings of a tree belonging to T. S. fall upon the land of T. N., and T. S. go upon the land to take them away, an action of trespass lies, provided the falling of them there might, by using proper precaution, have been prevented.

Where property on another's land, trespass justified in certain cases.

Latch: 120.

But it follows from this that the mere fact of my property being on another man's land, will not justify a trespass by me to take it away: and this was laid down in *Anthony v. Haney*. For supposing there were any dispute as to the property, as, for example, in "a certain barn, three outhouses, three leantos, and certain chattels standing and being on the plaintiff's close, that would be to take the law into the defendant's own hands, and to render an action of ejectment unnecessary. It would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace."

8 Bing: 187.

On similar principles it has been decided that where goods have been feloniously taken and deposited on another's land, trespass to recover them is not justified; but if it is deposited on land to which there is a right of entry, the recaption is justified and the question of trespass does not arise. The law is thus stated by Blackstone: "As the public peace is a superior consideration to any one man's private property, and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would resort to a state of nature; for these reasons it is provided

Trespass to recover stolen goods not justified unless owner of land be the thief.

[p. 245, 8th ed.]

that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law." But this rule is strictly applied to trespass on the land of a third party not the wrongdoer; therefore, "if a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again, for they came there by his own act": *Patrick v. Colerick*.

3 M. & W.
483.

[*ante*, p. 333.]

Bailor may not
justify tres-
pass.

The rule laid down in *Anthony v. Haney* applies to bailor and bailee. The note in Viner's Abridgment is as follows: "When a man bails goods for another to keep, it is not lawful for him, though the doors are open, to enter into the house of the bailee and to take the goods, but ought to demand them; and if they are denied, to bring detinue, and to obtain them by law."

Trespass for
goods pur-
chased not
justified with-
out proper
(8 M. & W.
488.)

provision in
the contract.

11 A. & E. 34.
[*cf.* p. 336.]

With regard to the sale of goods on the premises of the vendor it would seem that the main principle applies, unless there is an express term in the contract of sale that the vendor may or shall fetch away the goods himself: *Williams v. Morris*. If it is a term of the contract it is irrevocable, and no action will lie against the purchaser even though the seller had locked the gates and forbidden the defendant to enter, and he had broken down the gates in order to get the goods: *Wood v. Manley*.

(γ.) *Leave and license.*

This brings us to the third ground of justification, leave and license; that is, the defence that the defendant was on the plaintiff's ground with his permission: *Feltham v. Cartwright*. But this license is revocable even when by deed, and after the revocation the party becomes a trespasser: *Wood v.*

7 Sc: 695.

Revocation of
the license.

Leadbitter; and it was said in that case that the license could still be revoked although there were a contract. And it would seem that the revocation need not be by words, but may be made manifest by acts, as by locking a gate across the way. 13 M. & W.
838.

The case of *Wood v. Leadbitter* is so important that we must pause to give a short analysis of the principles laid down in it, which in fact cover the whole law of leave and license.

The facts were these. The plaintiff had bought a ticket for the enclosure on the Doncaster racecourse, of which Lord Eglintoun was owner. By order of Lord Eglintoun the plaintiff was removed from the enclosure, although he had in no respect misconducted himself, and the price of the ticket was not returned.

The first principle in the case is "that no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed." Such inheritances lie in grant: for instance a right of common, which is a profit à prendre, or a right of way which is an easement, cannot be granted without a deed. Incorporeal
inheritances
affecting land,
lie in grant.

Secondly, the distinction between a license and a grant, as defined by Vaughan, C.J., in *Thomas v. Sorrell*, was adopted: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it, had been unlawful: as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which without license had been unlawful. But a license to hunt in a man's park and carry away the deer killed to his own use; or to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the act of hunting and cutting down the tree; but as to the carrying away of the deer killed and tree cut down, they are grants." Vaughan, 351.
Definition of
license.

"So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*,

firing my wood, and warming him, they are licenses ; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and the wood burnt. So as in some cases, by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property."

The following propositions were then laid down :—

General rules as to licenses. (a.) A mere license is revocable : as to come and hunt on my land.

(b.) A mere license by deed is also revocable.

(c.) A license coupled with a grant, by parol or deed, is irrevocable : as to come and hunt on my land, and take away the deer when killed to the hunter's own use : *unless*,

(d.) A license by parol is coupled with a grant which ought to be by deed and is not, then it is revocable : as to come on my land and there to make a watercourse, to flow on the land of the licensee.

(e.) In such a case if it is by deed, the question then is whether the deed amounts to a grant of the watercourse : if it does, then it is irrevocable.

Contract is immaterial.

The facts of the case pointed to nothing more than a mere license, which was therefore revocable, and the fact that the plaintiff had paid a valuable consideration for the privilege of going into the enclosure was held to be immaterial.

[*ante*, p. 334.]

In *Wood v. Manley*, "the license was coupled with an interest : The hay, by the sale, became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer, irrevocable."

Trespass to restore plaintiff's goods improperly on defendant's land, justified.

Analogous to the plea of leave and license is the justification that the goods in question belonged to the plaintiff, and that the defendant has put them upon the land of the plaintiff ; this does not amount to a trespass if they were on the defendant's property by the wrongful act of the plaintiff himself : *Rea v. Sheward* ; in which case Parke, B., cited the

following extract from Viner's Abridgment with approval: "If a man comes into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the sledge and bar in my close, in an action of trespass for taking and carrying them away I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff, inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them, by tort of the plaintiff."

(δ) *Abatement of Nuisances.*

Abatement of nuisance is a good justification of trespass in certain cases. We have already considered the general principles governing the right to abate. We must however reconsider a special class, abatement by demolition, where a house is erected or in such a condition as to be a nuisance; in other words, in the erection of which the builder has trespassed, or from the condition of which trespasses have arisen.

Abatement of nuisance justified.

[*ante*, p. 162.]

The right to pull down the house was established in *Perruddock's case*, but that case has been considerably modified. In *Perry v. Fitzhove* it was decided, on the ground of the risk of a breach of the peace, that when the offending houses are occupied at the time of the demolition there is no justification for the trespass. But this in its turn was limited by *Davies v. Williams*, which decided that if notice were given to the persons inhabiting the house, the trespass would be justified.

Modification of principle in case of demolition of houses.

5 Co. 100 b.

8 Q. B. 757.

16 Q. B. 546.

In *Burling v. Read* the facts were distinguished from *Perry v. Fitzhove*. In the earlier case the defendant was only entitled to common of pasture on a close appurtenant to the land on which the house was erected: but in *Burling v. Read* the defendant was the owner of the soil on which a workshop had been erected, and the fact that the plaintiff was in the place at the time of its demolition was held to be immaterial.

11 Q. B. 904.

Nothing was said as to notice, and it was evidently considered by the judges to be unnecessary.

Continuing
nuisance not
justified by
satisfaction
(10 A. & E.
503)
for erection of
nuisance.

An action for a trespass unsuccessfully defended, even with judgment and satisfaction, will not justify the continuance of the trespass. "The former action," said Lord Denman, C.J., in *Holmes v. Wilson*, "was for erecting buttresses. The present action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass."

The trustees of a turnpike road had built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into Court in full satisfaction of the trespass, and after notice to remove them and a refusal to do so, brought another action for continuing them.

[*Addison*, p. 331.]

"If a man throws a heap of stones, or builds a wall, or plants posts or rails, on his neighbour's land, and there leaves them, an action will lie against him for the trespass; and the right to sue will continue from day to day, till the incumbrance is removed."

Trespass *ab initio*.
8 Co. 146 a.
[1 Sm: L. C.
143, 8th ed.]

Finally, on this branch of the subject we must notice the celebrated *Six Carpenters' Case*. The facts were as follows: Thomas Newman, carpenter, and six other carpenters entered the common wine tavern of John Vaux, the door thereof being open, and did there buy and drink a quart of wine, and there paid for the same: and further, John Ridding, servant of the said John Vaux, at the request of the six carpenters, did there then deliver them another quart of wine and a pennyworth of bread, and then they there did drink the said wine and eat the bread, and upon request did refuse to pay for the same. The only point in the case was, if the denying to pay for the wine, or non-payment, which is all one, made the entry into the tavern tortious. And the Court held it did not.

The following three principles were laid down in the case :

(a.) When entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*.

(b.) Where an entry, authority, or license is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*.

(c.) Not doing cannot make the party, who has authority or license by the law, a trespasser *ab initio*, because not doing is no trespass.

These three propositions speak with sufficient clearness for themselves : the cases in connection with them are collected and noted in Smith's Leading Cases [vol. I. p. 143]

A very similar point was decided in *Barnett v. Guildford*. It was held there that where the legal owner having been disseised had recovered seisin, his title related back from the time of his actual entry to the time of his legal right to enter, and that therefore he could bring an action for a trespass committed in the meantime.

11 Ex: 19.
Relation back
of title on
recovery of
property.

(iii.) *Who is entitled to bring an action for trespass.*

"Trespass," said the Court in *Lambert v. Stroother*, "is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question : " therefore, " whoever is in possession may maintain an action of trespass against a wrongdoer to his possession : " *Hasker v. Birkbeck*. In accordance with this principle it was laid down in *Graham v. Peat* that " one in possession of glebe land under a lease void by the statute 13 Eliz. c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrongdoer " : for, said Lord Kenyon, C.J., " any possession is a legal possession against a wrongdoer."

Willes 221.
Trespass is a
possessory
action.

3 Burr: 1563.
1 East 244.

With reference to an entry by the true owner, we have

17 Ch: D. 174.
[ante, p. 295.]
Entry by true
owner.

already noticed the recent decision in *Beddall v. Maitland*, in which the old statute of 5 Richard 2 was discussed. The law may be stated shortly as follows. If A. is in wrongful possession, B., the true owner, may gain entry in a peaceable and easy manner, and may then bring trespass against A. : if he cannot enter peaceably he must bring ejectment, coupled with a claim for mesne profits. But if B. enter with a strong hand then A. can proceed criminally under the statute against him, but cannot bring trespass against him because his own possession is unlawful. The rule therefore should be stated thus : " Possession is good against all the world except the person who can shew a good title " (Cockburn, C.J., *Asher v. Whitlock*), and those who act under the authority of the person who can shew a good title : *Chambers v. Donaldson*. In other words, the action being founded on actual possession by the plaintiff, he will make out a *prima facie* case, if he proves possession in himself, and entry by the defendant. He need not give any proof whatever of title or of right to the possession.

Rights
between con-
flicting tres-
passers.

But if there are two persons in a field each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, then the answer is, the person who has the title is in actual possession, and the other person is a trespasser. (Maule, J., *Jones v. Chapman*.) As to what amounts to taking possession, it is not necessary that the party who makes the subsequent entry should declare that he enters to take possession, it is sufficient if he does any act, to shew his intention. As for instance sending his labourers to plough the land : *Butcher v. Butcher*.

2 Ex: at p. 281.

7 B. & C. 399.

And it follows from what has already been said, that if two people are in possession of a field and neither have the legal title, that he who first entered is entitled to bring trespass against the other.

Trespass to
the reversion.

It follows also that a reversioner cannot bring in the ordinary course an action for trespass, but he may bring an action

for damages if his property, namely, the reversion, has been damaged.

We have already considered this point; it will be sufficient to notice one more case. In *Baxter v. Taylor* the landlord brought an action against a number of people who had placed upon ground in the occupation of a tenant, "divers large quantities of stones; and also with the feet of horses and the wheels of carriages, spoiled and destroyed divers parts of the said close, whereby the plaintiff was greatly injured in his reversionary estate and interest therein." The Court held, on the authority of *Jackson v. Pesked*, that the damage done must be of a permanent nature and necessarily prejudicial to the reversion, and that the facts disclosed only an injury of a very transient nature.

[ante, p. 132.]

4 B. & Ad: 72.

1 M. & S. 234.

With regard to co-tenants, the rule was laid down in *Murray v. Hall* that trespass *quare clausum fregit* lies by one of several tenants in common against his co-tenant where there has been an actual expulsion. (See *Jacobs v. Seward*.)

Trespass
between
co-tenants.

7 C. B. 441.

[post, p. 354.]

With regard to licensees, we have already discussed the justification of lease and license, from which it will be seen that a license being revocable, trespass will not lie by the licensee against the licensor. The more complicated question which arises as between licensees and third parties, we propose to reserve for the section of this chapter which deals with the interference with rights of property generally.

Licensees.

[post, p. 368.]

§ 2. TRESPASS TO PERSONALTY.

With regard to trespasses or injuries to personalty, such of the principles of conversion apply as are in their nature applicable to the case: the chief of these being, of course, the inquiry as to who may bring the action. The difference between trespass and conversion is solely in the nature of the act, which will abundantly appear in the next section of this chapter. "Trespass to personalty, as distinguished from

[See § 3.]

Distinction
between
trespass to
personalty and
conversion.
8 M. & W. at
p. 549.

conversion, is defined to be a wrongful act done to goods with which the party has no right to meddle. Scratching the panel of a carriage, for example, would be a trespass." (Alderson, B., *Fouldes v. Willoughby*.)

§ 3. CONVERSION OF PERSONALTY.

Conversion is
deprivation of
possession.

Owing to its nature, however, personal property is capable of being wrongfully dealt with in other ways than real property: that is to say, the true owner, or lawful possessor, may be deprived of its possession, and this in law is termed conversion: the subject, like trespass, may be divided into two heads: (i.) Who may bring the action; (ii.) What amounts to a conversion.

There are two forms which the action may take. The chattel itself, and damages for its detention, may be recovered in detinue; or damages alone may be recovered in trover.

(i.) *Who may bring an action for conversion.*

Conversion is
a possessory
action.

1 Str: 505.

Practically the same rule applies to personalty as to realty with regard to the right to bring an action for its conversion; this right depending on possession and not on property. Against a wrongdoer possession is title. In *Armoury v. Delamirie* the plaintiff, a chimney-sweeper's boy, found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now, in trover against the master, these points were ruled: (i.) That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to

keep it against all but the rightful owner. (ii.) That the action will lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

On the same principle, a gratuitous bailee may maintain an action against one who has dispossessed him of the goods : *Nicolls v. Bastard*.

By bailee.

2 C. M. & R. 659.

But there is an important distinction between personalty and realty in this respect, that whereas the reversioner of realty may not as a rule bring an action for trespass, the bailor of personalty (who, of course, corresponds with the reversioner of realty) may always bring an action for conversion of the goods the subject of the bailment. The reason of the distinction is obvious, for conversion from its nature implies a damage (a total disseisin) to the reversion.

By bailor, because his reversion is injured.

It is important to notice the distinction between the custody of a bailee and that of a servant: for in the latter case there is no change whatever of possession of the goods, but the possession remains in the master, and the servant has but a charge or oversight, whereas in the case of a bailee there is a positive change of possession. A servant, therefore, cannot sue for conversion of goods committed to his keeping.

[Story on Bailments, § 93, i.]

Not by servant who has only charge of goods.

But a bailee may be guilty of conversion, either at the expiry of the period of bailment, by refusing to re-deliver to the bailor, or during its continuance: this, however, will be considered under the subject of what amounts to a conversion.

Conversion by bailee;

[*Post*, p. 352]

So, too, the bailor or true owner may be guilty of conversion of the property he has bailed. As in *Roberts v. Wyatt*, where it was laid down that a plaintiff who is entitled to the temporary possession of a chattel, and delivers it back to the owner for an especial purpose, may, after that purpose is satisfied, and during the continuance of his temporary right, maintain trover for it against the true owner.

by bailor.

2 Taunt: 268.

From what has been said, it is clear that as a general rule the defendant in an action by the bailor may not set up that the goods are the property of a third person. But

Jus tertii.

6 Ex: 341. this rule does not hold good if a claim has been made upon him in respect of them by the true owner. As in *Cheesman v. Exall*, where the plaintiff transferred the property in some plate by bill of sale to M., in order to defeat a judgment creditor, the plaintiff continuing in possession. The creditor assigned his judgment to M., and the plaintiff deposited the plate with the defendant. In trover by the plaintiff for the plate, the Court held the defendant was entitled to set up *jus tertii*, that is, the right of M.

But the *jus tertii* must clearly appear: thus, if the deposit be by way of a bill of sale which is fictitious, and if there is no judgment creditor, the owner of the goods may repudiate the fraud originally meant to have been practised (but which has
1 Q. B. D. 291. not been practised), and recover the goods: *Taylor v. Bowers*.

(ii.) *What amounts to a conversion.*

Definition of
conversion.

The general definition of conversion in its commonest form may be taken from Baron Alderson's judgment in *Fouldes v. Willoughby*: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, for he is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it; and consequently amounts to an act of conversion. So the destruction of a chattel is an act of conversion, for its effect is to deprive me of it altogether." This marks very clearly the distinction between trespass to personalty and conversion of personalty, which we have already noticed, the former being an injury to goods without interference with the property in or posses-

Distinction
between tres-
pass and
conversion.

sion of it: the latter being an act interfering either with the property or the possession. It would seem that destruction of the property falls under either head, but the damages would, in either case, be the same.

It is evident that in nearly all cases of conversion the measure of damages involves, as one item, the full value of the goods, or the return of the goods themselves; the other item being damages for the loss of ownership in the meantime: in trespass the measure of damages is simply the actual damage done to the goods. The first class of cases under conversion includes all those in which the defendant has asserted a title, as evidenced by some act of dominion over the goods. A mere act of dominion of itself will not, however, as a rule, amount to a conversion, unless it evidences an assertion of the adverse title.

The act of dominion must be accompanied by assertion of adverse title.
8 M. & W. 540.

In *Fouldes v. Willoughby* the defendant, the manager of a ferry, had embarked the plaintiff and his horses. In consequence of the plaintiff's behaviour the defendant told him he would not carry him across; he thereupon disembarked the horses and lodged them in an hotel, and a message was sent to the plaintiff, who in the meanwhile had crossed the ferry, that he might have the horses on sending for them and paying for their keep, but that if he did not send for them they would be sold to pay expenses. The horses were in fact sold. The sole question discussed was whether the judge had been wrong in directing the jury that the mere fact of putting the horses on shore amounted to a conversion. The sale and the apparent retention of the proceeds were not touched upon in the judgments. The Court held that this putting them on shore was no conversion, because in doing it the defendant recognised them as the plaintiff's property. If he had thrown them overboard, whereby they had been drowned, that would have been a conversion. "But it has never yet been held," said Lord Abinger, C.B., "that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion."

L. R. 8 Ex:
126.

No conversion
without
physical
control over
goods.

Pretended
control is not
conversion.]

In *England v. Cowley* the plaintiff was the holder of a bill of sale, and default having been made he took steps to distrain. He was, however, met by the landlord, who said half a year's rent was in arrear, and that he would not suffer any of the goods to be taken away until it was paid; he also stationed a policeman outside to prevent their removal. The plaintiff thereupon gave up the attempted removal, and went away leaving a man still in possession. The defendant did not himself actually take possession of nor remove any of the goods upon this occasion, his object being to prevent the plaintiff's removing them in order to distrain the next day, it being then after sunset. The Court held there was no cause of action, on the ground that the defendant had done nothing, but had only threatened to do something. The plaintiff ought to have proceeded with the removal, leaving the defendant to stop him at his peril. "The gist of the action," said Bramwell, B., "is the *conversion*, as for example, by consuming the goods or by refusing the true owner possession, *the wrong-doer having himself at the time a physical control over the goods*." Even if there had been actual prevention, the learned Baron thought no action would be maintainable. "A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, You shall not take that pistol of yours out of the drawer—and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction and say to him, You shall not go that way, you must turn back, and make him comply. Who could say that I had been guilty of a conversion of the horse? The truth is that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way but altogether—that he has been entirely deprived of the use of it. It is not enough that a man should say that *something* shall not be done by the plaintiff: he must say that *nothing* shall."

The gist of the conversion being the absolute deprivation of the owner's possession, it is immaterial whether it be done by the defendant for his own use or for the use of some third person; as in *Hiort v. Bott*, where the plaintiff sent to the defendant an invoice for barley, which stated that the defendant had bought the barley of the plaintiff through G. as broker. A delivery order was also sent which made the barley deliverable to the order of consignor or consignee. G. called on the defendant, who told him it was a mistake; whereupon G. asked him to endorse the order to him and he would return the barley to the plaintiffs. The defendant did this, and G. sold the barley and absconded. The Court held that although the jury had found he had no intention of appropriating the barley to his own use, yet, having endorsed the order without any occasion to do so, and without authority, he was liable. Bramwell, B., put a simple illustration: "If a man gave a quantity of another person's wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it himself."

May be converted for own use or somebody else's.

L. R. 9 Ex: 86.

Where the act of dominion amounts to a total destruction of the goods it is conversion, the usual ingredient that it is taken for the benefit of the defendant or some third party entirely disappears; but the intention to deprive the plaintiff of the goods must be present.

It is obvious that one of the commonest forms of conversion is the sale of chattels which do not belong to the vendor. "Every sale without restriction implies an assertion of title; and if the party have no title or authority to sell, the act renders him liable to the true owner to an action for conversion." The whole subject was much discussed in the House of Lords in the well-known case of *Hollins v. Fowler*, as well as the kindred subject of dispositions of property by persons of a certain class, which do not amount to a conversion; in other words, what conversions are excused or justified. It will be instructive to follow the learned judgment of Blackburn, J., given in the House of Lords.

Sale of other people's goods.

[Bigelow, p. 428.]

L. R. 7 H. L. 757.

Facts in
Hollins v.
Fowler.

The facts were these. B. had fraudulently obtained cotton from Fowler. Hollins, "whose ordinary business was that of a cotton broker, and who was ignorant of B.'s fraud, purchased the cotton from B. in the belief and expectation that M., one of his ordinary clients, would accept it. (He bought therefore as agent for an undisclosed principal.) M. did afterwards accept it, and H. received from M. a broker's commission, but no trade profit on the sale. Fowler brought an action of trover against Hollins.

Legal prin-
ciple applic-
able.

The legal positions necessary to determine the case are these: First, the legal right to the possession, before the purchase by Hollins, remained in Fowler; and B., having obtained the cotton fraudulently, could not (except by a sale in market overt) confer on any one, however innocent, a title superior to his own. Secondly, if there has been a conversion of the plaintiff's goods by any one, however innocent, that person must pay the value of the goods to the real owners. Consequently if M., who had worked the cotton up into yarn, had been sued, judgment must have gone against him for the value of the cotton; and he would be liable to pay the price over again, though he had honestly transmitted it to the plaintiff through B., and it had not reached him in consequence of B.'s fraud. Thirdly, Hollins had bought as agent for an undisclosed principal, he was consequently personally liable on the contract. The question then resolved itself into this: did Hollins's subsequent transfer as agent to M. of the cotton amount to a conversion? His Lordship then emphasised the fact that most of the difficulties attending questions of this nature were to be solved by remembering the nature of the action, as Lord Mansfield said in *Cooper v. Chitty*: "The bare defining of this kind of action, and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently the solution, of the question in this particular case. In form it is a fiction; in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the

1 Burr: 20.
The action of
trover.

defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten."

Hollins v. Fowler.

The proposition which has been already laid down as to the elementary definition of conversion, requires therefore this qualification ; it must be an interference with the property of another which would not, as against the true owner, be justified, or which at least would not be excused in one who came lawfully into the possession of the goods.

From this point of view the question of notice of the plaintiff's title may sometimes become an important factor in determining the question. Thus a demand and refusal always affords very strong evidence of a conversion, as in *Loeschman v. Machin*, where the hirer of a piano sent it to an auctioneer to be sold : it was held that not only was the hirer guilty of conversion, but also the auctioneer, who had refused to deliver it up unless the expense incurred were first paid.

Demand and refusal evidence of conversion ;
2 Stark: 311.

Nevertheless, if the possessor has a *bonâ fide* doubt as to the title, he is justified in detaining them a reasonable time in order to clear up the doubt. This was decided in *Vaughan v. White*, where a person having made a statutory declaration that a pawn-ticket was lost, claimed the goods from the pawnbroker, but before they had been given up the holder of the ticket claimed them ; the pawnbroker having refused to deliver them to him on the ground that the declaration had been made, the Court held that the proper question for the jury was whether he meant to apply them to his own use, or to assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject ; and also whether a reasonable time for so doing had not elapsed, without which it would not be a conversion. From

unless there is *bonâ fide* doubt as to title.
6 M. & W. 492.

*Hollins v.
Fowler.*

what has been said on the right to set up the *jus tertii*, it is clear that if the claim of a third party be properly set up there can be no conversion.

Finder of
goods.

So, too, the finder of goods is justified in taking steps for their protection and safe custody until he finds the true owner.

Dealing with
goods at
request of
person who
has the
custody :

[*See* Blackburn J.
at p. 766, L. R. 7
H. L.]

On the next point there is no decided case for the general principle, although there are examples of it. It rests therefore on the dictum of the learned judge who enunciated it: "One who deals with goods at the request of the person who has the actual custody of them, in the *bonâ fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was the finder of the goods or intrusted with their custody."

5 B. & Ald:
247.

e.g., servant of
warehouse-
man.

Thus, in *Alexander v. Southey*, where goods, the property of the plaintiff, had been warehoused by an insurance company, and one of their servants who kept the key refused to deliver the goods to the plaintiff without an order from the company, it was held that there was no conversion by the servant. So in the case, if *Hollins* had sent the delivery order to M., who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool and carry them to Stockport, and the railway company had done so, it was suggested they would not have been guilty of conversion in the absence of any knowledge that more was being done than merely changing the custody.

But there are some acts which, as we shall see, would not be excused if done by the finder or custodian, and consequently which would not be excused if done by their authority.

In Comyns' Digest [Action on the case—Trover, E] it is said, "If a man deliver the oats of another to B. to be made oatmeal, and the owner afterwards prohibits him, yet B. makes the oatmeal, this is a conversion." "But suppose,"

suggested Blackburn, J., "the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then?" In *Stephens v. Elwall* a clerk acted under an unavoidable ignorance, and for his master's benefit, in sending certain goods to his master, but nevertheless the act was held to amount to a conversion. He assisted in transferring the goods from their then possessor (Deane) to his master with intent to transfer the property in them: but Deane's title was bad against the plaintiffs, who were assignees of one Spencer, because he had bought them from Spencer after an act of bankruptcy of which the clerk, the defendant, was unavoidably ignorant.

Hollins v. Fowler.

[at p. 768.]

4 M. & S. 259.

Therefore, in the case Mr. Justice Blackburn considered, and the House held that Hollins had been guilty of a conversion, not merely because he had entered into a contract with B., nor merely because he had assisted in changing the custody of the goods, but because he had done both: because they had knowingly and intentionally assisted in transferring the dominion and property in the goods to M. in order that M. might dispose of them as their own, and Fowler never got them back.

The result of this analysis seems to bring us to a case very analogous to the case of involuntary trespass by mowing, the liability there having been rested on the simple fact that an intentional act had been committed, although the nature of the act was not dependent on the defendant's will.

[ante, p. 210.]

The case of an auctioneer selling goods committed to him by a person wrongfully in possession would apparently be decided on similar principles. In *Cochrane v. Rymill* the auctioneer was held liable in trover by a person who held a bill of sale over the horses sold. If this is sound, the fact that the auctioneer had made an advance to the vendor upon the goods which he retained out of the proceeds would seem to be immaterial. In the *National Mercantile Bank v. Rymill* the auctioneer did not in fact sell the horses, but only took a

Trover against auctioneer.

40 L. T. 744.

44 L. T. 767.

commission on a sale effected by the grantor of the bill of sale after they had been sent to his stables.

Conversion by
bailee.

The next difficult question to be considered is conversion by a bailee.

L. R. 1 Q. B.
585.

Facts in
Donald v.
Suckling.

In *Donald v. Suckling*, A. had deposited debentures with B. as security for the payment at maturity of a bill indorsed by A. and discounted by B. B. was to have a power to sell the debentures if the bill were not met at maturity. Before the maturity however B. deposited the debentures with C. as security for a loan larger than the amount of the bill. The bill was dishonoured; and while it still remained unpaid, A. brought detinue against C. for the debentures. It was clear that C. could have no larger right than B., and therefore that he could not retain the debentures after A. had met the bill. But the question was whether without meeting the bill an action of detinue could be sustained. As in the last case, the various points of law which arise may be best taken from the judgment of Mr. Justice Blackburn.

Distinction
between
lien and
pledge.

In the first place it is important to distinguish between a lien and a pledge. A lien is a purely personal right of detention, and therefore in certain cases an unauthorised dealing with the property coming within the rules already discussed amounts to a conversion.

7 East 5.

In *McCombie v. Davies* a broker had pledged with the defendant, for a debt of his own, certain tobacco of his principals upon which he had a lien. In trover by the principal against the defendant, Lord Ellenborough held he was entitled to recover, "because the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal": he afterwards added, "that he would have it fully understood that his observations were applied to the *tortious* transfer of the goods of the principal by the broker undertaking to *pledge them as his own*, and not to the case of one who, intending to give security to another to the extent of his lien, delivers over the actual possession of the goods on which he has the lien to that other, with notice of

his lien, and appoints that other as his servant to keep possession of the goods for him." *Donald v. Suckling.*

In all cases of pledges by agents within the Factors' Acts, the pledge is now available to the extent of the factor's interest.

But in the case *B.* had no lien, and was not an agent within the meaning of the Factors' Acts. The Court thought however that where chattels were deposited by way of security with a disposing power in a certain event, there the pledgor had an interest in the property, or real right as distinguished from a mere personal right of detention. And in an early case, *Mores v. Conham*, the Court said that the pawnee or pledgee "is responsible if he insureth the pawn: also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to detain it if he detains it upon payment of the money by the owner." *Owen* 123.

"He is responsible if he insureth the pawn": and consequently if it is reinsured by one to whom he has assigned it, it would seem that both he and his assignee are (alternatively) liable.

And "insuring the pawn" has by a series of cases been understood to mean dealing with it in some way wholly repugnant with the terms of the holding; acting in some way wholly inconsistent with the contract under which the limited interest arises. If he does this it must be considered, as it was said in *Fenn v. Brittleston*, to have renounced the contract, which operates as a disclaimer at common law: or as it is put by Williams, J., in *Johnson v. Stear*, he must be considered to have violated an implied condition of the bailment. "Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them." In other words, he is liable for a trespass to the chattel. But on the other hand, if the act, though unauthorised, is not so repugnant to the contract as to shew a disclaimer, or to amount to a breach of one of its conditions, it is otherwise. Thus, where the hirer of a horse for two days

"Insuring the pawn."

7 Ex: at p. 160.

15 C. B: N. S. 330.
Violation of condition of the bailment.

Donald v. Suchling.

to ride from Gravesend to Nettlested deviated from the straight way, and rode elsewhere, it was held that the hirer had a good special property for the two days, and, though he misbehaved by riding to another place than was intended, that was to be punishable by an action on the case, and not by seizing the gelding: *Lee v. Atkinson* (1).

Yelv: 172.

[*ante*, p. 353.]

The Court therefore held in the case, in accordance with the decision in *Johnson v. Stear* on almost similar facts, that the sub-pledging of goods, held in security for money, before the money is due, is not in general so inconsistent with the contract as to amount to a renunciation of that contract, and that under the circumstances the defendant had not been guilty of conversion.

Estoppel.

6 A. & E. 469.

9 B. & C. 577.

The case of *Pickard v. Sears* carries us a step further, and introduces the principle of estoppel which had already been discussed in *Heane v. Rogers*. The plaintiff was mortgagee of certain machinery belonging to one Metcalfe, who remained in possession, carrying on his trade, until execution issued. In trover against the purchaser of the machinery from the sheriff, the defendant proved that, even after the sheriff had entered, and even after the plaintiff knew that a sale was in contemplation, he had come to the premises, and had given no notice of his claim. It was held that he could not recover. In the earlier case, on somewhat similar facts, the plaintiff was held not estopped, the jury having found that his presence at the sale was with a view of looking after his property to see that the sale was conducted in the most advantageous manner for himself.

Conversion by co-tenants.

L. R. 5 H. L. 464.

With regard to co-tenants, and the right of one tenant in common to maintain trover against his co-tenant, the subject was discussed in the House of Lords in *Jacobs v. Seward*. The facts were that one tenant in common of a field made

2 Ex: 479.

(1) But if the bailment be gratuitous, then a deviation from the object of it would seem to amount to a conversion: *Bryant v. Wardell*.

and carried away a crop of hay, and then put a lock upon the gate.

The rule was approved which was laid down in *Fenning v. Lord Grenville*, that so long as the tenant in common is only exercising lawfully the rights he has as tenant in common, no action will lie against him by his co-tenant. There the plaintiff and defendant were tenants in common of a whale, and the defendant's servant turned all the fat and blubber into oil, and appropriated them and the bone to himself. It was held that trover would not lie, because the very purpose of capturing a whale was to turn it into oil. The question as to sharing the profits would of course be a different matter, the remedy being then under the statute 4 Anne, c. 16, s. 27, by a proceeding for an account.

An action, however, will lie in certain cases against a co-tenant: as with regard to land it will lie for actual ouster, so with regard to personalty, for destruction of the common property: or where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights. As in the case of a ship being taken possession of by one tenant in common and sent to sea without the consent of his co-tenant. Or in the case of the whale, if the object of the partnership had not been the manufacture of oil, but the exhibition of the animal. Or where there has been something equivalent to destruction, as a sale in market overt: *Mayhew v. Herrick*.

Action will only lie for an actual destruction of the common property.

7 C. B. 229.

§ 4. INTERFERENCE WITH OTHER RIGHTS OF PROPERTY.

We have now to deal with an exceedingly difficult class of cases, which may be variously described: they are usually cases of interference with rights of property other than realty, personalty, or such incorporeal rights as are rights *in rem*, copyright for example. They are in all cases rights which have been acquired in some way or other, such as by contract

Interference with rights acquired by

contract or
license.

or license, against another person, and are so far rights *in personam*. The inquiry which forms the subject of this section is whether there is any more extended right attached to this right *in personam*; whether there is coupled with it any right *in rem*; or, correlatively, whether there is laid on all other people a duty to forbear from interfering with that right *in personam*; whether, in short, it may be accurately described as property. The point arises in different forms, which however will be found to be intimately connected. The three most usual forms in which the question appears, are seduction or enticing away of servants; procuring contracting parties to break their contracts; disturbance of easements or rights acquired by license or grant.

(i.) *Seduction of servants.*

Action by
master for
seduction of
servant.

Seduction (or rather rape), so far as the party seduced is concerned, is only an aggravated form of assault, for which she has her action against the seducer for damages so long as she was not a consenting party. But a different set of circumstances have to be considered when we examine the right of a third party to bring an action in respect of it. From this point of view seduction is a convenient head under which to group all the cases in which the act is done to the servant, and a consequence has resulted to the master: that is to say, seduction, enticing away, assault, &c., of the servant, in consequence of which act there is a loss to the master of the servant's services.

Loss of
service the
basis of the
action.

It is usually said that the loss of service is the gist of this action, and there is no doubt that it is maintainable in many cases: the question arises, however, whether it is maintainable in all cases, that is to say, whether an action will lie whenever this loss of service is the result of the defendant's act. The following cases were given by Bovill, C.J., in his judgment in *Evans v. Walton*: "If a man ought to have toll in a fair, &c., and his servants are disturbed in gather-

ing the same, he shall have trespass for assault of his servants, and for the loss of their service. . . . Trespass for beating his servants *per quod servitium amisit*, lies, although he was not retained, but served only at will. . . . And so, if A. retains B. to be his servant, who departs into another country and serves C., A., before any request or seizure, cannot beat B.; and, if he does, C. shall have trespass against him, and recover damages, having regard to the loss of service; and the retainer is traversable." And in conformity with these ancient *placita* the Court held that an action would lie simply for enticing away the plaintiff's daughter, although there was no allegation that the defendant had debauched her. The other important point in the case was whether it was necessary to prove that the relation of master and servant actually existed. Service at will was in the old case held to be sufficient; and consequently Willes, J., declared that he felt "no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether *de son bon gre* or *sur retainer*, he is equally entitled to her services, and to maintain an action against one who entices her away."

No need of allegation that servant has been debauched.

Service due to father sufficient to support action.

The learned judge expressed an opinion that this rule might be amplified into a general proposition. "I apprehend," he said, "that where the relation of master and servant exists, any fraud whereby the servant is induced to absent herself affords a ground of action." We shall have occasion to revert later on to this proposition.

Rule extended to any fraud.

Turning next to the question of seduction, which, as we have seen, was put out of the consideration of the previous case, we find the law in a very unsettled state. It is evident that one of the consequences of seduction, if it be followed by pregnancy, would naturally be loss of service: but the offence is of a more serious nature and may lead to other consequences,

Law as to seduction.

such as illness and expense of medical attendance, disgrace in being the father of a ravished girl or in having bastard grandchildren, and the personal disquietude and possible break up of a household: and the question is whether any of these of themselves will form sufficient ground to support an action.

L. R. 3 Q. B.
599.

11 East at
p. 24.

In *Terry v. Hutchinson*, Blackburn, J., said: "In form the action is by the master having a right to the services of the servant, and having lost the benefit of those services by reason of the wrongful act of the defendant; but though in form this is the nature of the action, the damage by loss of service is in reality merely nominal; and so long ago as Lord Ellenborough's time, as he says in *Irwin v. Dearman*, the practice had become inveterate of giving to the parent, or person standing in *loco parentis*, damages beyond the mere loss of service in respect of the loss aggravated by the injury to the person seduced. In effect, the damages are given to the plaintiff as standing in the relation of parent, and the action has at present no reference to the relation of master and servant beyond the mere technical point on which the action is founded: for in ninety-nine cases out of a hundred the natural guardian is the master to whom the service is due at the time."

Measure of
damages.

It is possible that in course of time the principle may be extended to cover the hundredth case. As the law stands at present it may be stated as follows: "The jury are to consider the injury as done to the natural guardian, and all that can be referred to that relation (I do not say that they ought to calculate the actual cost of the maintenance of the grandchild, though they cannot well exclude that fact); but they may consider not only that the plaintiff has a daughter disgraced in the eyes of the neighbours, but that there is also a living memorial to the disgrace in a bastard grandchild." But this relates only to the action by the natural guardian, if he is entitled to her service at the time of the seduction: the question naturally does not arise in the case of an ordinary

master, unless indeed he undertake the necessary medical attendance: but the case which the law has not at present provided for is one which must be of frequent occurrence, seeing that absence of consent of the party seduced is not essential to the action: it is where the seduction has taken place during a service from which the girl is discharged in consequence; the natural guardian not being entitled to her service at the time of the seduction, has no redress for the disgrace which has been brought upon him. As Blackburn, J., pointed out, the fundamental element of the action is the loss of service to which the plaintiff was entitled, but the law has gradually added to that other elements of damage. So on the other hand, the law has gradually extended the class of persons whose right of service may properly be said to be detracted from.

In the old cases already cited the father was considered as a master entitled to the service of love and affection from his children, and this irrespective of the rank of life in which the parties move. In *Edmonton v. Machell* this was extended to an aunt as one standing in *loco parentis*; and in *Irwin v. Dearman* to one who had adopted and bred up the daughter of a friend and comrade from her infancy, "on account of the loss of service to him, aggravated by the injury done to the object on whom he had thus placed his affection." So there is apparent a tendency to enlarge the bounds of the father's right. In *Terry v. Hutchinson* the Court held that his right to service revived immediately on her former master's dismissal: so that the father was held entitled to recover for a seduction which took place the day after the servant's dismissal and whilst she was on her way home. (But not if it take place before the dismissal: *Dean v. Peel*.) So where the servant does not give her whole time to the master, the father's right remains as to the residue, and his cause of action for seduction is not taken away: *Ogden v. Lancashire*; *Rist v. Faux*. On the other hand, if the whole time belongs to the master, and he allows the servant to occupy her spare

Who may
bring the
action.

2 T. R. 4.

11 East 23.

[ante, p. 358.]
Father's right
revives
directly
master is left.

5 East 45.

15 W. R. 158.

4 B. & S. 409.

L. R. 7 Ex:
283.

time in helping her father, he has been held to have no right to her service, and consequently to have no cause of action for her seduction: *Hedges v. Tagg*; except perhaps if the seduction had occurred in her holidays.

7 C. B: N. S.
96.

When the daughter is the head of her own household, and her father resides with her no action will lie: *Manley v. Field*.

7 B. & C. 387.

In *Harper v. Luffkin* a married woman had separated from her husband and had returned to her father's house, performing for him certain household duties. It was held that an action by her father for her seduction would lie.

The right to
service is
property.

Thus it will be seen that the law regards the right to service as property; the consequence of the defendant's act being an injury to that property, the act to the servant becomes tortious to the master and gives him a right of action, as in all other cases, in respect of the defendant's breach of duty to forbear from injuring the plaintiff by interfering with his right to property (1). And from this it would seem to follow that the nature of the act to the servant may be left out of consideration. This suggestion however is not made without diffidence, for it would seem to cover such an extreme case as the following: I meet a man in the street and give him something to drink: it turns out that he is another man's servant, and the time spent in drinking ought to have been spent in performing valuable service for his master: am I liable? I have certainly done something *per quod* the master *servitium amisit*.

Hypothetical
case.

Rules as to
remoteness to
be applied.

The question of remoteness of damage, however, must not be lost sight of. As will be seen, the cases in the next class were decided solely on that ground. In the seduction cases the question takes the following form: an intentional act: the consequence, loss of service to another: is that loss of service the natural consequence of the act—the consequence which

(1) It is of course an anomaly that an action cannot be brought in respect of other violations of rights to property resulting from seduction, unless the loss of the right to service is also present.

the defendant as a reasonable man ought to have foreseen? If he knew the person was in service, the answer must be "yes." And in some cases where there is no knowledge it must also be "yes"; as for example, in seduction of girls, or assault of young people, because the law assumes that she must be in somebody's service, if not a master's, then her father's. In other cases the knowledge that the person was in service, although the question does not appear to have been considered in the decisions, would seem to be an important element in the action: and this will perhaps furnish a satisfactory answer to the hypothetical case propounded above. It will be necessary to examine this point at greater length under the third division of this section.

Knowledge of the service important.

There is a case (*Ashley v. Harrison*) in which a libel was uttered of the servant, who left her place in consequence, and it was held that the damage was too remote. So it would require a very strong case to enable a master to maintain an action for loss of service, where he himself had discharged a servant in consequence of a slander or libel.

1 Esp: 48.
Libel on servant, *per quod*, not maintainable.

(ii.) *Abduction of married woman.*

In an action by a husband against one who entices away his wife, or receives her into his house and suffers her to continue there after notice from the husband not to harbour her, the gist, or *per quod* of the action, is *consortium amisit*; and it lies in all cases except where the wife has left the husband on account of his ill-treatment. Under *consortium* are included "the comfort and assistance" of the wife, and therefore the action somewhat resembles those in respect of enticing away servants. In the leading case, *Winsmore v. Greenbank*, the "comfort and assistance" were that the wife, during her absence, had had a fortune left to her to her separate use: and it was held that the action lay.

Abduction of a wife actionable.

Willes 577.

But the ground of this action is that the defendant retains

No action if
defendant's
act is mere
hospitality.

1 Peake 114.

the plaintiff's wife against the inclination of her husband, whose behaviour he knows to be proper, or from selfish and criminal motives. If therefore she is received from motives of humanity, the action cannot be supported: and in such a case it is immaterial whether the wife's representation of her husband's cruelty be true or false: *Philp v. Squire*.

(iii.) *Interference with contract rights, other than with servants.*

We now proceed to examine the two well-known cases of *Lumley v. Gye* and *Bowen v. Hall*, which are the best examples of actions for interference with rights arising from contracts other than those of service.

2 E. & B. 216.
Facts in
Lumley v. Gye.

In *Lumley v. Gye* the manager of a theatre had contracted with Johanna Wagner to perform for him, with an express condition that she should not perform elsewhere during the term of her engagement. He alleged that the defendant, knowing the premises, and maliciously intending to injure him as manager, whilst the agreement was in force and before the expiration of the term, enticed and procured Wagner to refuse to perform; by means of which enticement and procurement Wagner wrongfully refused to perform, and did not perform during the term.

In the first place, the Court held (Coleridge, J., dissenting) that, the contract being for acts to be done, it was accurate to apply to the case the analogy of the master and servant cases already considered; that is to say, that that principle was not confined to menial servants (1).

[*ante*, p. 356.]

It will be remembered that in *Evans v. Walton*, Willes, J., suggested the following general rule: "Where the relation of master and servant exists, any fraud whereby the servant is induced to absent herself affords a ground of action." There

6 T. R. 221.

(1) In *Blake v. Lanyon*, a journeyman who was to work by the piece, and who had left his work unfinished, was held to be a servant: the Court laying down the rule that a person who contracts to do certain work for another is the servant of that other in respect of that work, and until the work be finished.

was in fact in that case a false representation made to the servant. This rule was intended to extend the ordinary case of assault on, or seduction of, a servant, to all cases of a tort committed against the servant, the consequence of which was loss of service to the master. But subsequent considerations tended to shew that it was doubtful whether a wrongful act to the servant, on which to base the action of the master, was essential. The gist of this action is, as we have seen, a violation of his rights under his contract, which rights are his property; for the sole essential ingredients of an action of tort are an intentional act on the part of the defendant without excuse, followed in the natural course of events by a consequence detrimental to the plaintiff.

Enquiry whether there must be a tort to servant.

In the cases we are now considering there is no trace of any wrongful act to the servant: the act which has resulted in the breach of the plaintiff's contract is no more than a simple act of speaking or of persuasion. Nor can any such wrongful act be necessary to the action.

If I by any means prevent a servant from fulfilling his contract, I damage his master's contractual property, just as much as when I convert my neighbour's horse to my use and prevent him drawing his cart, I damage his actual property. The contract with the servant stands in the place of the possession of the owner. And as in this case I have hindered the owner from exercising one of the rights of ownership, so in that case I have hindered the master from exercising one of the rights under his contract. The consequence of my act in either case is the violation of a right of property.

Analogy between damage to contractual property and to other property.

But as, in the case of chattels, which are bound to their owner by the rights flowing from possession, the acts which produce that consequence may be divided, without affecting the principles of liability, into trespass or damage to the chattel, and conversion or the withholding of the possession; so, in the case of servants, who are bound to their master by the rights flowing from contract, the acts which produce this consequence may be divided into two classes: first,

Chattels may be converted or trespassed against

with same result.

Servants may be injured or not injured

malice in law and malice in fact. Malice in law is a necessary ingredient of all torts. In all torts malice in fact will aggravate damages, and in some torts it is essential to the action. If the grounds of the action which we have advanced are accurate, then the tort is complete without malice in fact. In both *Lumley v. Gye* and *Bowen v. Hall* the act was malicious, but that does not prove it to be essential. The difficulty, however, solves itself in another way. For in *Lumley v. Gye* we have a decision that malice in fact will support an action for procuring a breach of contract; and a further decision that to procure this breach with a knowledge of the existence of the contract, an intention to injure one of the contracting parties will be inferred, and amounts to malice in fact.

governed by
rule of remote-
ness.

In the hypothetical case put, it will be remembered that it was this knowledge which prevented the rule as to remoteness applying, and which connected naturally the act with its consequences. Whether, therefore, we consider the question from the point of view of the plaintiff's intention, or from the point of view of the damage to the defendant as gauged by the principle of remoteness of damage, the result is the same: and it is therefore suggested that malice in fact is not an essential ingredient to the action.

If, however, there is actual malice in a form different from that inferred from knowledge, it would seem that the same test, that of remoteness, will furnish the answer to that question also.

Crompton, J., put another illustration shewing as his opinion that the principle he had enunciated would apply to all contracts, and would not be limited to contracts for service; and in this case also, in addition to the knowledge of the contract, there is an actual malicious desire to injure. "Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party,

I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt, if the injury were great, or much less than such amount if the injury were less serious, might not be required." It seems clear that the action would lie in such a case. Indeed it very much resembles the case of *Green v. Button*, in which it was held that an action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff, by asserting that he had a lien upon them, and ordering these persons to retain the goods until further orders from him. It was urged for the defendant that, as the persons in whose custody the goods were, were under no legal obligation to obey the orders of the defendant, it was the mere spontaneous act of these persons which occasioned the damage to the plaintiff; but the Court held, nevertheless, the action was maintainable. And if from mere knowledge of the existence of the contract a desire to injure the plaintiff will be inferred, and the actual breach of the contract will be held the natural consequence of the defendant's act, *à fortiori* it will be so held where the desire to injure the plaintiff is expressly proved. This was laid down in *Bowen v. Hall*. The majority of the Court of Appeal (Lord Selborne, C., and Brett, L.J.) limited, but as it would seem unnecessarily, their remarks to contracts for personal service; they were further of opinion that the act of the defendant was done with knowledge of the contract between the plaintiff and the other party, was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff, was done for a wrong motive, and would therefore justify a finding that it was done in that sense maliciously. There seemed some hesitation in accepting the broad proposition laid down in *Lumley v. Gye*, that merely to persuade a person to break his contract would give rise to a cause of action. That point however it was unnecessary to discuss in the case. But the learned judges held that, without doubt, if the persuasion be used for the indirect purpose of injuring

2 C. M. & R.
707.

6 Q. B. D. 333

the plaintiff, or of benefiting the defendant at the expense of the plaintiff, "it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." This being established, the decision of the case rested on the principle of remoteness of damage, which we have already discussed. An important quotation from the judgment of Brett, M.R., will be found on page 171.

The principle on which these cases proceed is in fact the simplest illustration of the rule that where the actual cause of damage is the act of a third party, the damages are not necessarily too remote because the act was so framed as to produce the consequence which did actually happen; and therefore this act must be the natural, reasonable, and probable consequence of the act of the defendant.

The conclusion from these cases (subject to the exceptions already noticed) is therefore this, that the law regards the right acquired in virtue of a contract, as property to which the ordinary rights of property are attached; that is to say, all other people are bound to forbear from disturbing them. Putting this into the language of jurisprudence, from a contract a *jus in personam* is acquired; there is in addition a *jus in rem* attached to it, that is, a right to forbearance from interfering with the *jus in personam*: any interference amounting to a tort if it fulfils the conditions applicable to all other cases of torts.

(iv.) *Interference with the rights of licensees.*

Rights of
licensees.
10 C. B. 164.
Facts in
Ackroyd v.
Smith.

We must now turn our attention to the important case of *Ackroyd v. Smith*. The facts were shortly as follows: A. demised land to B., with a covenant giving B. a right of way over other land in A.'s possession, but which right of way was not essentially connected with the use and enjoyment of the land. B. demised the land to C., purporting also to assign the covenant: C. availing himself of the right of way, A.

brought trespass *quare clausum fregit* against him, and he was held entitled to judgment: on the ground that the covenant was not one which ran with the land, and therefore, although B. had the right of way, yet he could not assign it to C. The case has given rise to some difficulty, and its application has been extended to an extraordinary length. It was thus concisely explained by James, L.J., in *Thorpe v. Brumfitt*: "It was there in substance said to the defendant, In any view of the case you are wrong. If this was a right of way appurtenant to a particular property, it could only be used for purposes connected with that property, and you have been using it for other purposes. If it was not, then it was a right in gross, and could not be assigned to you." In his judgment in the case *Cresswell, J.*, said: "It is not in the power of the vendor to create any rights not connected with the use or enjoyment of the land and annex them to it, nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee. It would be a novel incident annexed to land that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he was owner and occupier, have a right of road over other lands."

L. R. 8 Ch: at
p. 655.

The extension of this case to the subject now under discussion occurred in *Hill v. Tupper*. A canal company granted by deed to the plaintiff the exclusive right of putting boats on the canal for hire. The defendant, without any grant or permission, put his boats on the canal for hire, and thereby deprived the plaintiff of profit which he would otherwise have made. In an action for damages consequent upon this apparent disturbance of his right, judgment was given against the plaintiff. Pollock, C.B., said: "After the very full argument which has taken place, I do not think it necessary to assign any other reason for our decision than that the case of *Ackroyd v. Smith* expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it, so as to constitute a property in

2 H. & C. 121.
Interference
with exclusive
right to let
out boats.

the grantee. This grant merely operates as a license or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right." It was then said that he could sue in the name of the grantors, apparently for trespass, but the loss of his own profit could hardly be damages in such an action.

The analogy between the two cases does not seem sound.

The connection between the two cases obviously depends on the word "property," and if it is sound must work out in the following way. If a man has acquired a right which he cannot assign, he cannot be said to have any property in the right: and as he has no property in it, he cannot be disturbed by any third person in the enjoyment of it.

[ante, p. 335.]

Much the same argument was applied to the facts of *Wood v. Leadbitter*: it was said that since a license granted by A. to B., even though a valuable consideration were given for it, was revocable at A.'s pleasure, B. could not maintain an action against C. for disturbing him in the enjoyment of his license.

4 C. B: N. S. 556.

Rights of several licensees among themselves.

It is doubtful, however, whether this position is quite sound. It certainly must be distinguished from such a case as *Corby v. Hill*. There the facts were that the plaintiff used a private road to a house by the leave and license of the owner. The defendant under a prior license from the owner deposited some building materials on the road. They were left at night without lights or warning. Cockburn, C.J., held that the action was maintainable on the broad ground that the owner himself could not have justified the placing of an obstruction after he had held out an inducement to the plaintiff to use his road, and that therefore a third person claiming under him could not do so either. Where there are several licensees, the rule was laid down that each must exercise his right with reasonable precautions not to injure the others. The learned judge further said that he inclined "to think that where a general leave and license is given to use a road as a means of access to a given place, any subsequent leave to place an obstruction there would be inoperative."

But it is very doubtful whether the major premiss in the proposition which connects *Hill v. Tupper* with *Ackroyd v. Smith* is sound. [*ante*, p. 369.]

The reason for the decision in *Ackroyd v. Smith*, it is suggested, does not touch upon any question of property, but upon the ordinary rules as to covenants running with the land: only such covenants as run with the land (one of which would have been a right of way appurtenant to the demised land, or a right of way entirely connected with the use and enjoyment of it) are binding as between the original grantor and the assignee of the original grantee, for very obvious reasons, which were fully explained in *Keppell v. Bailey*. ² M. & R. 517. It is a very different proposition to say that because the grantee is in the enjoyment of a covenant which he cannot assign by reason of its not running with the land, therefore any one may disturb him in that enjoyment with impunity. The remark made by Cresswell, J., seems to have been stretched beyond its due limits. The vendor cannot create rights not appurtenant to the land, and make them appurtenant so as to extend to such rights the rules as to covenants running with the land, "*so as to bind it in the hands of an assignee*," but this is a narrower proposition than the application of it in *Hill v. Tupper* implies: that is, that the vendee will not be protected against disturbance of any rights he has acquired from the vendor unless they are rights appurtenant to the land. It is with great submission suggested that *Ackroyd v. Smith* did not decide any such principle as that ascribed to it by the learned Chief Baron. At the time it was decided the mere fact of non-assignability certainly was not the test of property.

If, however, *Hill v. Tupper* is rightly decided, the proposition to be deduced from the case is this: that for the disturbance of an easement in gross (1) no action will lie, a rule

(1) "Easement in gross" is not, as is well known, an accurate expression, there being no dominant tenement. The rights to which the expression applies are, however, well understood, and it is a convenient term to apply to those rights, and one now in general use: see Gale on Easements.

which has been more than once combated, notably by Bramwell, B., in *Nuttall v. Bracewell*. The doubt above expressed as to the soundness of the proposition, seems to have been felt by the learned author of *Gale on Easements*: "It may," he says, at p. 13 (a), "be questioned whether the owner of an easement in gross would not have the same remedies which he would have if it were appurtenant. A right of common or other profit *à prendre* may be claimed as a right in gross, and there should seem to be no reason why an incorporeal right, not involving participation in the profits of the servient tenement, should not be capable of being conferred in like manner with an incorporeal right involving such participation. *Ackroyd v. Smith* is not inconsistent with this position. A right of way cannot be so granted as to pass to the successive owners of land as such, in cases where the way is not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant. In fact, the grant in that case was an attempt to create a new kind of estate, a right of way at the same time in gross and appurtenant; in gross, in that it was in fact unconnected with the enjoyment of the land to which it was attempted to make it appurtenant; and appurtenant, in that the grant purported to limit it so as to go to the successive owners of that land in succession. This failed, but the case does not affect the position that as profits *à prendre* may be claimed in gross, and that such right may be accompanied with all the same remedies as easements appurtenant, and that the burden of them may run with the tenement over which they are claimed."

[*ante*, p. 368.]

The question
put in another
form.

The question may be stated in another form which tends to make it clearer. Whether the easement be in gross or appurtenant, the right acquired is a *jus in personam*: even if there be only a revocable license, there would still seem to be a *jus in personam* acquired until the revocation. The question in *Ackroyd v. Smith* was whether this *jus in personam* could be transferred to another person: and the rule laid down was

that if the easement is appurtenant it can be. In other words, that an assignee of the original grantee may acquire this right against the original grantor; or that the grantee or his assignee still retain this right against an assignee of the original grantor. If, however, the easement is in gross, both the right and the correlative duty are inalienable. But the question in *Hill v. Tupper* was whether (as in *Lumley v. Gye* [ante, p. 362.] and similar cases) to this *jus in personam* there is not also attached a *jus in rem*, or right to the forbearance of all other people from interference with the *jus in personam*: the fact that the *jus in personam* is inalienable seems, with submission, to have nothing to do with the question (1).

There is a class of cases which, although apparently raising the same point, seem to depend on somewhat different principles: they involve the rights of riparian owners. The facts are usually somewhat as follows. A. and B. are two riparian owners on a stream, each having the right to the natural flow of the water in its usual condition, and each having the right to use it and abstract it in a reasonable manner. A., the owner higher up the stream, assigns his right to C., a non-riparian owner: the question then arises in one of two ways, either in an action by B. against C. for the abstraction or pollution, as the case may be; or in an action by C. against some fourth party who has abstracted or polluted the water.

Rights of riparian owners to water.

The question as to C.'s rights has given rise to much discussion, but the general principles may be considered as fairly settled. "There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water-rights, and at the same time transfer those rights, or any of them, and thus create

He cannot keep the land and part with the water-right.

(1) *Hill v. Tupper* has been explained on another ground, that the right was twofold, the right to place boats on the canal, and the right to exclusive user or to exclude others from doing the same thing; and it has been suggested that for a disturbance of the first an action would lie, but for a disturbance of the other it would not; but if the doubt above expressed is sound, the nature or extent of the right granted would seem to be perfectly immaterial.

a right in gross by assigning a portion of his rights appurtenant. It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor, and has similar rights. But if he grants away any portion of his estate not abutting on the river, then clearly the grantee of the land would have no water-rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is that he can have them against the grantor, but not so as to sue other persons in his own name for an infringement of them." (*Stockport Waterworks Co. v. Potter*, approved in *Ormerod v. Todmorden Mill Co.*)

3 H. & C. at
p. 326.

11 Q. B. D.
155.

Rights among
themselves.

The respective rights of riparian owners are practically these: each has a right to a reasonable use, and if the use be reasonable there seems to be no reason why he may not exhaust the water: those lower down the stream have a right to a reasonable use of the remainder, and so long as they have sufficient for their use the abstraction of an unreasonable quantity by one above them does them no damage, and gives them no right of action. Where, therefore, there has been a grant to a non-riparian owner of a right to take water, the questions are twofold, first: has the amount abstracted deprived the lower owner of the water necessary to his rea-

7 Ch: D. 122. sonable use? if it has not, *cadit quæstio* (*Kensit v. Great Eastern Ry. Co.*); if it has, then secondly: was the use by the owner higher up the stream unreasonable? not the use by his grantee, but the use by the grantor in so making the grant. But in this matter it is a question of concurrent and perhaps conflicting rights: one riparian owner owes duties to another riparian owner only, and the analogy to a close borough introduced in the argument in the last-mentioned case, seems so far accurate that one owner need only recognise another owner, and may refuse to recognise any grantee or licensee. If the damage has been done by the grantee it would seem that the action

Remedy for
damage to
grantee.

could be brought against the grantee, or against the grantor who has allowed the damage to be done by his grantee : and on the other hand, if the grantee suffers damage by the action of a riparian owner higher up the stream, the action must be brought by the grantor (or in his name by the grantee) for any damage suffered in consequence by the grantor.

Stockport Waterworks Co. v. Potter "simply decides that the grantee of a riparian proprietor must take the water as he finds it. If it is dirty when it comes to the mouth of his pipe he cannot complain of those (riparian proprietors) who have dirtied it. He has not the rights of a riparian proprietor." But no case goes to the length of saying that he may not sue in respect of pollution or other disturbances by people other than riparian proprietors. It would seem in accordance with what has already been said that such an action will lie (1).

Subject then to the doubt as to easements in gross and licenses examined above, the general proposition already advanced as to the right to forbearance from interfering with rights acquired as against certain determinate persons, by contract or otherwise, is of universal application.

§ 5. SLANDER OF TITLE.

The last group of cases in which injuries to rights of property are considered may be conveniently classed under the above head. In many points they resemble other forms of torts already considered, and not a little discussion has arisen as to whether its proper place is under slander or false representation. We have already pointed out how those two torts

Slander of title.

(1) In *Nuttall v. Bracewell*, by the construction of a goit the course of a river was altered and a new channel created. The majority of the Court held that because the stream flowed in two branches, the owner of the land along which the new branch passed was a riparian owner. L. R. 2 Ex. 1.

are allied. The nature of the right injured in this case however, so much resembles the one we have just considered, that we prefer to consider it here.

3 Bing: N. C.
371.

No presumption
of
damage.

The leading case of *Malachy v. Soper* affords a good illustration of the facts out of which the action arises. The plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in Chancery to which the plaintiff had demurred. The defendant published falsely that the demurrer had been overruled; that the prayer of the petition (for the appointment of a receiver) had been granted; and that persons duly authorised had arrived at the mine. The rule was there established that an action lay for such a false statement on proof of special damage: but, as in other cases where a similar rule obtains, that it would not lie unless proof of damage were given. In other words the law does not in such a case presume damage.

The reason for this rule would seem to be the same as the reason already given for the distinction in slander between the four special cases and other words, namely, that the act is not of such a nature as must of necessity be productive of damage. And this rule is applicable whether the words be spoken or written, the reason for distinguishing between slander and libel in words affecting the reputation not being supposed to exist where the words affect property.

Plaintiff
cannot be
hindered in
sale of the
land.

4 Jones 196.
Style 169.

"Of slander of title, the plaintiff shall not maintain an action unless it was *re vera* a damage, *scil.*, that he was hindered in sale of his land; so there the particular damage ought to be alleged" (*Lowe v. Harwood*). And in *Cane v. Golding* an action was brought on the case for slandering the plaintiff's title by speaking these words, "His right and title thereunto is nought, and I have a better title than he." It was alleged that he was likely to sell and was injured by the words. Rolle, C.J., said, "There ought to be a scandal and a particular damage set forth, and there is not here." The doctrine is, therefore, that the plaintiff ought to aver that, by the speaking, he could not sell or lease; and that it will not be

sufficient to say only, that he had an intent to sell, without alleging a communication to sell, because unless he could not sell he has not suffered damage. And this even though malice in fact is proved.

The consequence of the rule is that we find many instances of endeavours to bring an ordinary case of slander of title within the special rule of slander, that damage is presumed when the words are spoken of a man in his profession or business. Thus in *Evans v. Harlow* the plaintiff was a manufacturer of certain patented articles. The defendant issued a caution to purchasers stating that the patent did not exist; that the plaintiff's articles did not fulfil their purpose, but that he, the defendant, was the maker of a similar article which did. The Court drew the distinction between this caution as to goods, and a caution against a tradesman in the habit of selling goods he knows to be bad. As no special damage was laid, judgment was given for the defendant. It is therefore important to distinguish between these two cases: if an allegation against a man in his professional capacity can be made out, the case will fall under the ordinary rules of slander of personal reputation; if it does not, then it falls under the rules we are about to consider: the first of which is that special damage (that is to say actual damage) must be laid and proved.

Attempts to
get out of the
rule.

5 Q. B. 624.

Turning to the consideration of the nature of this special damage, it is obvious that the only form which this damage can possibly take is the prevention of a sale of the property in question. It is presumed that the actual damage being loss of custom, this may be proved in the usual way without alleging the loss of particular customers: but on the other hand, more especially where the property is realty, the damage is usually the loss of the benefit under a particular contract which is thrown up in consequence of the false statement, which contract must of course be proved. The nature of the injury is therefore very analogous to the interference with contractual rights considered in the preceding sections

[cf. p. 173.]

Applies to
realty and
personalty.

L. R. 9 Ex:
218.

of this chapter. This being so, it is immaterial whether the contract be with reference to real or personal property.

In the *Western Counties Manure Co. v. Lawes Manure Co.* the statement by the defendant was to the effect that the plaintiff's artificial manures were inferior in quality to other artificial manures, and that they were especially inferior to the defendant's, whereas in truth they were not so: and this false statement caused the plaintiff to lose customers.

The Court held that a good cause of action was disclosed, and that malice in fact was not essential to the action; the allegation of malice was in fact supported only by those facts which are necessary to malice in law.

[cf. p. 272.]

3 B. & S. 264.
Comparisons
by rival
traders not
within the
rule.

This case was distinguished from an earlier case, *Young v. Macrae*, in which there had also been a comparison made by the defendant as to the relative merits of the plaintiff's and another person's oil. There, although special damage was proved, it was held that the declaration did not disclose a good cause of action, because the disparaging statement was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendant's own goods.

Malice in fact.

L. R. 4 Q. B.
733.

This brings us to another important case in which under the circumstances it was laid down that malice in fact was essential to this action: *Wren v. Weild*. The plaintiff alleged that the defendant falsely and maliciously wrote to, and told persons who had bought certain machines of the plaintiff that the machines were infringements of the defendant's patents, and that the defendant claimed royalties for the use of the machines, and that if they used the machines without paying royalties he should take legal proceedings. The plaintiff at the trial offered to prove various specifications and machines existing before the date of the defendant's patent, to shew that the defendant's specification claimed matters that were not new, and also that the defendant had used them. The judge ruled that, as the defendant's patent was still subsisting and not set aside on *scire facias* or other-

wise, the evidence was immaterial, and directed a nonsuit. The damage of course lay in the fact that negotiations for sale of the plaintiff's machines had been broken off as the result of the defendant's threat. The Court of Queen's Bench upheld the learned judge's ruling, on the ground that although the evidence which the plaintiff intended to produce would probably have shewn the defendant's patents to be bad, yet that did not touch the fact that the defendant did claim a right in himself, and that what he did only amounted to a notice to purchasers of something which he was in fact going to do. "It is obvious," said Blackburn, J., "that, where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and, indeed, in common fairness bound, to give the intended purchasers warning of such his intention. And, consequently, we think no action can lie for giving such preliminary warning, unless either it can be shewn that the threat was made *mala fide*, only with intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful."

This proposition evidently lays down a rule as to these cases exactly similar to the rule in slander and libel. The first part establishes that the occasion is privileged; the second, that the privilege may be rebutted by proof of malice in fact. This view was taken by Bovill, C.J., in *Steward v. Young*. There a person died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the shop for some time and then died, having in the meantime given a bill of sale on the furniture to her landlord by way of security for a debt which she had contracted. After her death, the plaintiff took out letters of administration to her late husband's estate, and, informing the landlord that the bill of sale was invalid, the widow having no title to the furniture, he proceeded to sell it by auction. The landlord interposed to forbid the sale. And on the authority of *Wren v. Weild* the Court held no action would lie. The occasion

The same rule applicable as in libel and slander.

L. R. 5 C. P. 122.

[ante, p. 378.]

of privilege obviously arose on account of the alleged interest in the goods possessed by the defendant: and the rule therefore would seem to be that it is not fatal to the privilege that the interest does not in fact exist, so long as the defendant does intend to act upon what he supposes to be right. If he knows that he has no claim at all, then the privilege cannot arise, as was the case in *Green v. Button*. But if it does in fact arise, then it may be rebutted by proof of malice in fact, and the common form which this malice takes is the absence of intention to follow up the threatened action. It is of course difficult for the plaintiff to prove this absence of intention: but the point arises in a very practical shape when an injunction is applied for to restrain the issue of circulars threatening legal proceedings. It will as a rule be granted, unless the patentee who circulates them will undertake to commence proceedings to establish the validity of his patent:

[*ante*, p. 367.]

Threat of legal proceedings.

L. R. 13 Eq: 355.

L. R. 18 Eq: 330.

Rollins v. Hinks; *Armann v. Lund*.

If the defendant's claim is true, then, as in slander of personal reputation, no question of privilege or no privilege can arise, the statement is justified, however maliciously in fact the statement may have been made.

If the defendant's claim is untrue then, if it be made maliciously in fact, the privilege is rebutted; and in this respect the ordinary acceptance of the word malice is the criterion, that is, a desire to injure the plaintiff, or to benefit the defendant or some third party at the plaintiff's expense. (See

19 Ch: D. 386. *Halsey v. Brotherhood*.)

Privilege arises in consequence of a duty to speak.

3 C. B. 831.

The occasion of the privilege is very similar to the occasions on which it arises in cases of slander; it is in some respects even clearer, as it is rested on a duty towards the person warned. A good illustration of this is furnished by the case of *Pater v. Baker*. A surveyor of highways attended a public auction and made a statement with regard to certain houses, or rather carcasses, which the plaintiff was then about to sell: the statement was, "My object in attending this sale is, to inform purchasers, if there be any here present, that I shall

not allow houses to be finished or occupied, until the roads are made good in Agar Town. I have no power to compel any one to make the roads ; but I have power to stop the buildings until the roads are made. If there shall be any purchasers, they will have to keep the carcasses in their unfinished state until the roads are made." It appeared that the surveyor had entirely mistaken his duty and his power under a certain statute : but it was clear also that he was acting under a sense of duty and could not be considered in the light of a mere volunteer coming forward to make such a statement. The privilege was therefore held to have arisen, and there being no evidence of malice in fact, the rule for entering a nonsuit was made absolute.

A very similar point arose in *Pitt v. Donovan*, and was decided on the same grounds ; the defendant was trustee of the marriage settlement of one Y. who was about to sell certain property to A. : he had written to A. imputing insanity to Y., and stating that the title would therefore be disputed, *per quod* the proposed purchaser refused to complete. Under the settlement a term of years in the estate in question was vested in the defendant as trustee for securing to Mrs. Y. her jointure, and the occasion was consequently held to be privileged. 1 M. & S. 639.

So in *Mildmay's Case* it was said : Forasmuch as the defendant " hath taken upon him the knowledge of the law and meddling with a matter which did not concern him, had published and declared that Oliffe had a good estate for 1000 years, in slander of the title of Mildmay, and thereby had prejudiced the plaintiff, as appears by the plaintiff's declaration ; for this reason the judgment given for the plaintiff was affirmed in the writ of error." 1 Co: at p. 177, b.

This last case is a good illustration of the old slander of title cases, but from what has been said it will be seen that although it is convenient to retain the old name for the sake of grouping the cases, in its old form it is of rarer occurrence Old form of the action has disappeared.

than in the new form which has been grafted on to it. The old form related to realty only, the new relates to property generally, realty and personalty, corporeal and incorporeal; and this has introduced other modifications; an assertion of right in the defendant in conflict with the plaintiff's right may or may not be present, there may be no more than a statement that the plaintiff is acting with regard to property in a wrongful way, or that the defendant intends to act with regard to property in some way affecting probable purchasers; it has, therefore, become now an action of the simplest form, brought for a false statement injurious to the plaintiff in his right to property.

Conclusion.

It can hardly have escaped our readers that one of the principal objects in this study of the Law of Torts, has been to reduce as much as possible the principles of that law into a more homogeneous shape than has hitherto been attempted. Confusion and false analogy must abound if fresh sets of principles are devised for every fresh set of circumstances, as has been too often the case. It seems only possible to divide the subject into the three great heads of, (1) General Principles; (2) Acts and Intention; and (3) Consequences. The second splits up into involuntary, negligent, and intentional acts, with the subdivisions of fraud and malice. The third splits up into the three great divisions of rights: to the person, to reputation, and to property. All liability for acts must fall under one of the divisions of the second head. All consequences must fall under one of the divisions of the third head. But any given act may produce consequences under any or all of the three divisions of the third head: and any given consequence may proceed from an act which falls under one or more of the divisions of the second head.

A false imprisonment may affect the person imprisoned in his person, his reputation, and his property. The loss of a sum of money may be the result of a negligent act, or of a fraudulent or malicious act. And so it is with words

spoken or written. They may affect the person spoken of, or they may affect the person spoken to : the person spoken of in his reputation or his property : the person spoken to in his property. And according to these consequences of the words, has the case been grouped under Slander and Libel, Slander of Title, or False Representation. In this case we have endeavoured more especially to shew that the principles are the same in all three cases, modified only according to circumstances ; and that the modifications themselves also proceed upon well-defined principles which are to be found grouped under the first division of the subject.

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